87-1729

No. 87-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

v.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5050

In re FORFEITURE HEARING AS TO CAPLIN & DRYSDALE, CHARTERED

Claimant,

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CAPLIN & DRYSDALE, CHARTERED,

Claimant-Appellee,

and

CHRISTOPHER F. RECKMEYER, II;
ROBERT BRUCE RECKMEYER,

Defendants,

National Association of Criminal Defense Lawyers (NACDL); National Legal Aid and Defender Association (NLADA); and American Bar Association (ABA); Amici Curiae.

Argued Oct. 6, 1987.
Decided Jan. 11, 1988.

Before WINTER, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting in banc.

WILKINSON, Circuit Judge:

This case presents a Sixth Amendment challenge to the application of the criminal forfeiture provisions of the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. § 853, to defense attorneys' fees. Appellee Caplin & Drysdale contends that forfeiture of attorneys' fees violates the Sixth Amendment right to the assistance of counsel. We reject this challenge because there is no established Sixth Amendment right to pay an attorney with the illicit proceeds of drug transactions. The difficult policy choices posed by application of the forfeiture statutes to attorneys' fees provide no basis for the creation of such a right. Those choices are properly the concern of Congress, not the federal courts, and the plain language of the criminal forfeiture provisions indicates that Congress did not intend for attorneys' fees to be exempted.

I.

A.

The Comprehensive Forfeiture Act of 1984 (CFA), Pub. L. No. 98-473, 98 Stat. 2040 (1984), revised the forfeiture provisions of both the RICO and CCE statutes. This case concerns only a CCE prosecution, but the RICO provisions are basically identical. The CFA generally expanded the type of property that is subject to forfeiture, the crimes that can give rise to forfeiture, and prosecutors' ability to restrain property transfers by defendants both before and after indictment. Restraining orders under the CFA allow courts to enjoin defendants or their associates from moving

money out of the courts' reach prior to a conviction so as to escape forfeiture. *See* 21 U.S.C. § 853(e).

Critical to this case is the CFA's "relation back" provisions, under which forfeiture occurs at the time an offense is *committed*:

> (c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States . . .

21 U.S.C. § 853(c). The government thus takes the forfeited property that was in the hands of the defendant at the time of the offense, not at the time of conviction. Application of this provision to fees paid to an attorney prior to a conviction results in forfeiture of the fees, because the government's interest in the property predates the transfer to the lawyer.

The CFA allows a third party such as the attorney to assert an interest in the forfeited property in a post-forfeiture hearing. The third party can prevail only if:

> (B) The petitioner, is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853(n). Thus, if attorneys or other third parties can meet the requirements of § 853(n), they may retain property that would otherwise belong to the government under § 853(c).

B.

This controversy over attorneys' fees arose during the tax and CCE prosecution of Christopher Reckmeyer. Reckmeyer controlled an illicit drug operation that employed over twenty people, distributed tons of marijuana and hashish, and created business entities that laundered drug profits through various types of transactions. Reckmeyer's plea agreement stated that his organization was responsible for the distribution of more than 169 tons of marijuana and ten tons of hashish over the course of fifty ventures. Reckmeyer realized millions of dollars from drug transactions, which were his only significant source of income. *See United States v. Reckmeyer*, 786 F.2d 1216, 1217, 1222 (4th Cir.1986).

During the summer of 1983, eighteen months prior to his indictment in the Eastern District of Virginia, Reckmeyer retained the law firm of Caplin & Drysdale. On January 14, 1985, the government obtained an *ex parte* restraining order under the CCE statute preventing any transfer of Reckmeyer's assets. One day later the government filed an indictment that sought forfeiture of virtually all of Reckmeyer's assets. Reckmeyer made regular fee payments to Caplin & Drysdale. One of these payments consisted of approximately $25,000 in cash, delivered to the firm on January 25, 1985, the day Reckmeyer surrendered to authorities. The firm notified the court of the receipt of the funds, which were then deposited in an escrow account. After the indictment, Caplin & Drysdale continued to represent Reckmeyer at his request.

Reckmeyer pled guilty to three counts of the indictment on March 14, 1985. On the following day, the district court denied Caplin & Drysdale's motion to exempt its fees from a post-indictment restraining order that had been issued in January. The court ruled that because Reckmeyer had pled guilty, Caplin & Drysdale could claim its fees only through the post-forfeiture hearing provided to third parties by § 853(n). Upon Reckmeyer's conviction on May 17, 1985, the court entered a forfeiture order encompassing virtually all of Reckmeyer's assets, including the $25,000 held in escrow. One month later, Caplin & Drysdale filed a third-party claim for $170,000 in unpaid legal fees. Caplin & Drysdale asserted that CCE forfeiture does not encompass fees paid for legal defense services actually rendered, and that if the statute does encompass fees, it violates the Fifth and Sixth Amendments.

The court granted Caplin & Drysdale's third-party claim, holding that Congress did not intend for the forfeiture provisions to reach fees paid for actual services. *United States v. Reckmeyer*, 631 F.Supp. 1191 (E.D.Va.1986). The court further stated that an interpretation of the statute that allowed fee forfeiture would violate the defendant's right to counsel of choice and to effective assistance of counsel. *Id.* at 1196. The government appealed, and the case was consolidated for argument with two others. A panel of this court affirmed the district court, holding that the CFA does apply to attorneys' fees, but that the statute is to that extent unconstitutional because it violates the Sixth Amendment right to counsel of choice. *United States v. Harvey*, 814 F.2d 905 (4th Cir.1987). This court granted rehearing en banc in the *Caplin & Drysdale* case alone.

II.

The threshold question in this case is whether the CFA permits the forfeiture of attorneys' fees. As to that issue, we endorse the panel opinion in *Harvey* and briefly summarize its conclusions. The panel opinion noted that the CFA's language is unmistakably clear, and so plainly reaches property used or intended to be used for attorneys' fees that the inquiry should end without resort to legislative history. In any event, the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture under the terms of the CFA. *Harvey*, 814 F.2d at 913-18.

The language of the forfeiture statute makes no mention of attorneys' fees, either in its definition of property that is subject to forfeiture in sections 853(a) and (b), or in its provision for third-party claims of exemption in § 853(n). The clear terms of the statute subject a defendant's assets to forfeiture without regard to whether he intends to use them to pay an attorney. Similarly, the statute exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys. Where, as here, a statute's language is unambiguous, the court's task of statutory construction is at an end unless enforcement of the literal language would contravene a clearly expressed legislative intention. *Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 298, 78 L.Ed.2d 17 (1983).

The legislative history of the CFA reveals no congressional intent that would require exemption of attorneys' fees from the reach of the statute. Some courts have seized upon passages in the legislative history expressing the need to prevent defendants from avoiding forfeiture through sham transactions. From these passages, the courts have concluded that forfeiture is to apply to attorneys' fees *only* if the funds were given to the attorney not in return for services, but in order to fraudulently harbor them from forfeiture. *See United States v. Estevez*, 645 F.Supp. 869 (E.D.Wis.1986); *United States v. Ianniello*, 644 F.Supp. 452 (S.D.N.Y.1985); *United States v. Badalamenti*, 614 F.Supp. 194 (S.D.N.Y.1985); *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985). Congressional disapproval of a specific type of conduct cannot, however, legitimately be used to restrict statutory language that is unambiguously more broad. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-11, 100 S.Ct. 2051, 2057-58, 64 L.Ed.2d 766 (1980); *Harvey*, 814 F.2d at 916.

Further, limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute. Section 853(n) plainly says

that only those who purchase property for value and without cause to believe that it was subject to forfeiture shall be exempt from an order of forfeiture. The specific listing of the assets in the indictment and the payment of their fee in cash gave the attorneys representing Reckmeyer ample cause to know that the funds were forfeitable under 21 U.S.C. § 853. They have acknowledged that they have no claim to make under the clear terms of § 853(n).

III.

We next turn to Caplin & Drysdale's constitutional claims. Although no problems of standing attend Caplin & Drysdale's claim of a statutory exemption for their fees, we recognize as an initial matter that the firm's constitutional claims are in one sense raised in the abstract. Caplin & Drysdale's assertion of Sixth Amendment rights arises out of a prosecution in which the defendant has undeniably received every benefit conveyed by the Amendment. Reckmeyer was not only represented by counsel, but the counsel of his choice. So far as the record indicates, that representation was effective.

Nonetheless, we believe this case presents a justiciable controversy. Caplin & Drysdale has approximately $170,000 at stake here. It faces the "concrete injury" of the loss of that sum, a loss that is clearly occasioned by the government's application of the forfeiture statute and would just as clearly be redressed by the finding of unconstitutionality that the law firm urges. The elements of injury, causation, and redressability are all present, and the constitutional requirements for standing under Article III are thus satisfied. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976).

Caplin & Drysdale is therefore a proper party to assert Sixth Amendment objections to fee forfeiture, subject only

to the prudential concerns raised by third party assertions of constitutional rights. The Supreme Court has emphasized two prudential concerns with third party standing: the concern that constitutional rights not be litigated unnecessarily, and the concern that a third party may not advocate the right as effectively as its actual holder. *See Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2873-74, 49 L.Ed.2d 826 (1976).

In this case, each of the factors developed by the Court to address these prudential concerns plainly points to a decision on the merits. The interests of the defendant in hiring a lawyer and the interest of the lawyer in receiving a fee are "inextricably bound" together. *Id.* at 114, 96 S.Ct. at 2874. The assertion of this constitutional claim is extremely important to Caplin & Drysdale, criminal defendants, and the bar, and its resolution is in no way "unnecessary." Caplin & Drysdale is fully "as effective a proponent" of the right asserted as the defendant. *Id.* at 115, 96 S.Ct. at 2874. The firm's interest in its fee and in the future effects of fee forfeitability ensure ample incentives for proper adversarial presentation of the issues. Further, these issues have already been forcefully argued by the parties, decided by a district court, and reviewed by a panel of this court. The prudential concerns strongly favor the resolution of this issue by the en banc court, and we therefore turn to the merits of Caplin & Drysdale's claim.

IV.

In addressing Caplin & Drysdale's constitutional challenge, we emphasize at the outset that forfeiture of attorneys' fees poses no threat whatsoever to the absolute right to be represented by counsel. This right to representation is fundamental to our system, and universally recognized as an "immutable principle of justice" implicit in due process. *Powell v. Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). From its Fourteenth

Amendment origins in *Powell*, this principle has been refined, and its application broadened, in a series of cases construing the specific guarantee of counsel in the Sixth Amendment. It has come to mean that a criminal defendant has the absolute right to representation *either* by retained counsel or by appointed counsel in a proceeding that threatens imprisonment. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

There is no argument here over whether forfeiture can operate to deny a defendant this absolute right to representation—it cannot. At most, the Comprehensive Forfeiture Act can render a defendant unable to secure private counsel through a restraining order or the threat of future forfeiture of illicit funds. Should this occur, the defendant's right to representation will be protected by the appointment of counsel. The result here will have no effect on the basic and absolute Sixth Amendment right of CCE defendants to representation.

Some courts have suggested that forfeiture could violate this absolute right to representation where a defendant is unable to hire an attorney with assets in his possession due to potential forfeiture, but is unable to secure appointed counsel because he is not technically indigent. *See, e.g., United States v. Badalamenti*, 614 F.Supp. 194 (S.D.N.Y.1985). While it is true that Criminal Justice Act appointments are based on financial inability, *see* 18 U.S.C. § 3006A(a), the spectre of drug defendants being tried and convicted pro se is hardly realistic. No criminal defendant can be made to stand trial without counsel for any reason. *E.g., Powell, supra*. Which form that representation may take is debatable, but the absolute right to representation is not.

We cannot accept, however, the suggestion appearing throughout Caplin & Drysdale's argument that the presumption of innocence forbids any interference with a defendant's property prior to a verdict of guilty beyond a reasonable doubt. Forfeiture, like other pretrial deprivations, is problematic in that it can interfere with the use of property that is merely *alleged* to be illicit, and thus owned by the government. The fact that no trial has yet been held does not mean, however, that the government is powerless to protect the public interest in any way that interferes with liberty or property. To assign such a value to the presumption of innocence would mean, for example, that there could be no arrests, and certainly no pretrial detention of defendants. Just as the government may restrain liberty to prevent the flight of a suspect, *Bell v. Wolfish*, 441 U.S. 520, 534, 99 S.Ct. 1861, 1871, 60 L.Ed.2d 447 (1979), it may restrain property to prevent the flight of forfeitable assets. The presumption of innocence is of undoubted importance in assigning the burden of proof at trial, but it is not a grant of immunity from pretrial inconvenience. *Id.* at 533, 99 S.Ct. at 1870.

Pretrial deprivations of liberty or property must, of course, be imposed in accordance with the requirements of due process. The strictures of due process do not, however, convey an absolute right to be free of pretrial deprivations, just as the procedural protections of the Fourth Amendment do not convey an absolute right to hold one's property free of lawful searches and seizures. *Cf. Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (allowing seizure not only of fruits and instrumentalities of crime, but also of "mere evidence"). If there is any general objection to be made to forfeiture as a pretrial deprivation, it must be based on the *procedures* involved, not on a general right to be free from all restraint on liberty and property. No such procedural due process challenge is before us today.

The government has a strong interest in seeing that criminal assets are not dissipated prior to trial. Thus, no one would argue that the government must allow a defendant to use contested assets to purchase most categories of consumable services or goods. Neither restraining orders nor a merchant's refusal to sell to the defendant for fear of future forfeiture violates that defendant's rights. Given that the government may take steps to prevent these types of expenditures prior to a verdict, we are left with the question whether the Sixth Amendment forbids interference with an expenditure for the specific purpose of hiring a lawyer. For the reasons that follow, we hold that it does not.

V.

Both parties and courts have focused on the qualified right to counsel of choice as the basis for the proposed requirement that attorneys' fees be constitutionally exempt from forfeiture. Courts have recognized this right to counsel of choice as an independent right, expressed as the "right of any accused, if he can provide counsel for himself *by his own resources* or through the aid of his family or friends, to be represented by the attorney of his choosing." *United States v. Inman*, 483 F.2d 738 (4th Cir.1973) (emphasis added). As stated by the *Harvey* panel opinion, this "means, in general, a right to retain private counsel of choice *out of one's private resources*, free of government interference." *Harvey*, 814 F.2d at 905-923 (emphasis added). This right is a "qualified" right, defined primarily in cases where a defendant has sought a continuance in order to hire new counsel, and it is limited by the government's interest in the orderly administration of justice. *See, e.g., Sampley v. Attorney General of North Carolina*, 786 F.2d 610 (4th Cir.1986); *Inman, supra.*

We need not reach the question of how this right is qualified, however, for it simply does not apply at all in the fee forfeiture context. Each and every prior case ap-

plying the right to counsel of choice has assumed as its starting point that the defendant wished to hire counsel with *his own assets*. Here, this assumption is conspicuously absent. The very point of the inclusion of forfeiture in an indictment is the government's assertion that the assets possessed by a defendant are not legally his own, but the fruits of crime in which the law recognizes no ownership rights of the defendant. Forfeiture is not an attempt to punish those with legal assets by denying them an attorney; it is an assertion that the defendant does not have the legal assets that entitle him to a right to counsel of choice in the first place.

The fact that the government contests the legal ownership of the assets is crucial. The government could not, for example, simply restrain funds to which it claims no legal entitlement so as to force a defendant to accept appointed counsel. *See United States ex rel. Ferenc v. Brierley*, 320 F.Supp. 406 (E.D.Pa.1970). For this reason, fee forfeiture is not, as the *Harvey* panel has suggested, the constitutional equivalent of a government-imposed cap on spending for defense counsel or a law requiring those charged with certain crimes to rely on appointed counsel. In these situations, the government attempts to restrict the defendant's use of his own undisputed assets. In the fee forfeiture context, the assets sought by the government are alleged to be an integral part of the very crime with which the defendant is charged. *See* 21 U.S.C. § 853(a) (providing for forfeiture of property "constituting, or derived from" proceeds of drug transactions, property "used or intended to be used" to commit drug violations, and property "affording a source of control over" a drug enterprise). The government seeks to deny use of the property not as a mere penalty, but because the assets are themselves illicit.

The right to counsel of choice belongs only to those with legitimate assets. The right to counsel does not guarantee that every defendant will have the lawyer he desires.

Rather, the Constitution reflects the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Morris v. Slappy*, 461 U.S. 1, 23, 103 S.Ct. 1610, 1622, 75 L.Ed.2d 610 (1983) (Brennan, J., concurring). The Sixth Amendment assures the fact of representation. Equality of representation has been thought a goal beyond constitutional attainment. Those with their own funds must be given the fair opportunity to secure counsel up to the limit of their funds; those without assets of their own must be satisfied with appointed counsel, over whose selection they may have little influence. *See generally*, Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan.L.Rev. 73 (1974). Inevitably, there are multitudinous circumstances and conditions that may remove a defendant from the class of persons who have a right to choose their lawyers, but that will not thereby infringe his Sixth Amendment rights.

Purely private predicaments may leave a defendant without the counsel of his choice. Any attorney may decline to accept a case despite the fact that he was chosen by a defendant. This decision may be made for the simple financial reason that the attorney does not expect the defendant to be able to pay. The possibility also exists that a creditor might obtain liens against a criminal defendant's property, preventing the defendant from hiring a lawyer. Rules imposed by the government may likewise prevent the hiring of chosen counsel. Rules requiring appointment of local counsel may have this effect. *See Ford v. Israel*, 701 F.2d 689, 692-93 (7th Cir.1983). Court-imposed scheduling may also prevent participation by chosen counsel. *See Inman*, 483 F.2d at 740. No Sixth Amendment violation exists in any of these situations, yet one is claimed where forfeiture produces the same result.

Forfeiture, in our view, is another of those events that may prevent a defendant from choosing his counsel but does not involve any denial of the qualified Sixth Amend-

ment right to counsel of choice. The most relevant analogy, though rejected by the panel in *Harvey*, is to the example of bank robbers' loot. Suppose a bank is robbed and $100,000 taken. A defendant is arrested in possession of $100,000 and nothing more. The defendant protests his innocence and claims, without the slightest proof, that the $100,000 was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty. Yet this is exactly the result that Caplin & Drysdale asserts must be guaranteed to the drug defendant. We reject this claim, for the situations are equivalent, and in each the government may legitimately take steps to preserve the contested assets. In each the defendant is entitled to representation by an appointed attorney if he has no uncontested assets available for securing private counsel.

The panel opinion attempted to dismiss the parallel between illicit drug proceeds and robbers' loot, but in our view it did not, and could not, succeed. The opinion states that the situations are different because the property seized from the bank robbery defendant is "manifestly that of someone other than the accused." *Harvey*, 814 F.2d at 926. But this will not always be the case: the robber may have deposited the proceeds in his own account or otherwise disguised them. Similarly, the assets sought to be forfeited from a CCE defendant may well be "manifestly" illicit, as is the case where the defendant has piles of cash and no records of any legitimate income whatsoever. Yet the broad constitutional rule that we are invited to create—outright exemption from forfeiture for all fees that are for services rendered, *see Harvey*, 814 F.2d at 927—would require release of the illicit assets to the defendant's chosen lawyer.

The *Harvey* panel also emphasized that CCE assets are not asserted to be those of a third party such as a bank,

but merely those of the United States. The government, like other litigants, however, may assert an interest in property to which it claims a legal entitlement. This is certainly true where that entitlement is specifically conveyed to further the imperative task of fighting organized drug enterprises. Civil forfeiture and jeopardy tax assessments are relevant analogies here. Several cases have persuasively rejected claims that jeopardy assessments causing inability to hire counsel violate the Sixth Amendment. *See United States v. Brodson*, 241 F.2d 107 (7th Cir.1957) (rejecting claim that jeopardy assessment preventing retention of counsel necessarily violates Sixth Amendment and rejecting as "immaterial" for purposes of a due process claim any distinction between indigency and "government-imposed" indigency); *see also United States v. Marshall*, 526 F.2d 1349 (9th Cir.1976) (rejecting any requirement that alternative funds for counsel be made available to a defendant whose assets were under a tax levy absent a showing of prosecutorial misconduct); *United States v. Allied Stevedoring Corp.*, 138 F.Supp. 555 (S.D.N.Y.1956) (rejecting corporation's claim that funds must be released from tax levy so that it could pay for chosen counsel, stating that counsel could be appointed if necessary). We similarly reject Caplin & Drysdale's claim that the Sixth Amendment forbids forfeiture proceedings that render a defendant indigent. In such a situation, Sixth Amendment requirements are satisfied by the availability of appointed counsel.

We thus decline to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets. The dissent suggests that it is the enormity of the class of crimes at issue that forms "the lynchpin of the majority's constitutional analysis." To the contrary, we do not single out any class of defendants for disfavored treatment. We simply decline the invitation of the dissent to accord this class of criminal defendants a unique and favored constitutional status. Such a rule would

constitutionally prefer the drug merchant with none but illicit assets not only to indigent defendants but to defendants with untainted assets, who must sacrifice them to secure the counsel of their choice. An outright exemption of attorneys' fees from forfeiture would impose a regime of stark inequality whereby those most successful in harvesting the fruits of criminal activity would be those most able to secure representation others are not constitutionally guaranteed and cannot personally afford.

Our conclusions have been well stated by a leading commentator on fee forfeiture:

> Criminal defendants have no sixth amendment right to demand that crime-related assets be kept available to pay for privately retained counsel. The sixth amendment guarantees only the right to use *legitimate* assets to obtain the assistance of counsel. If the defendant has no assets, the sixth amendment requires the appointment of counsel. It does not prevent prosecution of the indigent or require the government to provide the wherewithal to retain private counsel of choice.

Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va.L.Rev. 493, 533 (1986). Nothing in the Sixth Amendment requires what Caplin & Drysdale requests—a constitutional right to use criminal assets to hire counsel.

VI.

We hold, therefore, that forfeiture defendants may be required to rely on appointed counsel if they do not have sufficient uncontested assets to hire a private attorney. We likewise reject the contention that appointed counsel are presumptively unqualified to handle Continuing Criminal Enterprise cases.

To accept the argument that appointed counsel cannot provide a constitutionally adequate defense in CCE cases

would lead to the absurd result that the government could not prosecute drug defendants apprehended with no funds in their possession, for prosecution would be unconstitutional if the defendants could not afford firms specializing in the defense of drug offenders. *See* Brickey, *supra*, at 521. That forfeiture may place strains on public defenders' offices and Criminal Justice Act resources may be problems of policy, but they give this court no warrant to create new constitutional rules. There exist no grounds for a constitutional presumption of incompetence on the part of appointed counsel. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In a specific case in which a defendant receives ineffective assistance at trial, he can challenge his conviction on that well-established basis. *See Cronic, supra; Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We similarly cannot accept the assertion that fee forfeiture is unconstitutional per se because where a defendant *is* able to hire counsel it will create impediments to attorney-client communication and conflicts of interest. Where a defendant has been able to hire a lawyer of his choice, claims of interference in his relationship with that lawyer must at most be claims of government-caused ineffective assistance. Such claims may be properly reviewed only on the individual facts of a particular case. *Cf. United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (both rejecting claims of a per se Sixth Amendment rule against interference in attorney-client relationship). Claims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We will not declare fee forfeiture per se uncon-

stitutional on the basis of such speculative dangers to attorney-client cooperation.

Our decision not to declare fee forfeiture per se unconstitutional is bolstered by the fact that the impediments to communication and the potential for conflicts of interest are more theoretical than real. It is difficult to believe that, despite their professional obligations as defense lawyers, retained counsel will somehow attempt to go to trial with incomplete knowledge of a case so as to preserve "bona fide purchaser" status in the event of a forfeiture. Further, the Justice Department Guidelines for use of the forfeiture statutes minimize the possibility of this unlikely occurrence. Under the Guidelines, a prosecutor cannot pursue forfeiture of actual fees without reasonable grounds to believe that the attorney had *actual knowledge* that the *particular asset* with which he was paid was subject to forfeiture. See Justice Department Guidelines on Forfeiture of Attorney's Fees, 38 Crim.L.Rep. (BNA) 3001, 3004 (1985). Under this standard, if a defendant has any uncontested assets, the attorney should be able to satisfy himself that he is paid out of these assets with little difficulty, and thus have no fear of fee forfeiture. On the other hand, where an attorney chooses to accept payment in assets named in a forfeiture indictment or a huge cash sum, any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser.

The notion that defense attorneys will behave unethically as a result of potential forfeiture is also highly speculative. Caplin & Drysdale argues that defense counsel will enter into plea agreements carrying long prison terms for the client in return for a lessened forfeiture verdict that preserves their fee. We refuse to presume that members of the bar will act in such an unethical fashion, even assuming that they could convince their client and the court to approve. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986) (rejecting argument that allowing waiver of attorneys' fees in § 1983 cases would

lead attorneys to violate ethical obligations to their clients in order to protect their fees). We do not doubt that fee forfeiture will have important implications for defendants and lawyers alike, but these implications cannot justify declaring fee forfeiture per se unconstitutional.

Finally, the possibility that a prosecutor might abuse the forfeiture statutes in a particular case does not justify holding all fee forfeiture unconstitutional. Courts have ample tools for dealing with situations where prosecutorial misconduct threatens the fairness of a trial. Due process claims of this type must, however, be dealt with on specific facts. Every criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of facial invalidity.

VII.

The arguments advanced against fee forfeiture are in truth nothing more than an invitation for this court to make its own policy under the guise of creating a new constitutional right. Fee forfeiture does indeed raise many complex problems concerning access to defense counsel, the attorney-client privilege, and the resource needs of public defenders. All of these are weighty matters, yet none are violations of established Sixth Amendment rights. Congress in the first instance is the proper body to deal with these issues, and courts in specific cases are always present to prevent or to punish abuses.

In the Comprehensive Forfeiture Act of 1984, Congress recognized that the illegal drug trade poses a grave threat to every part of our society. The trade has spawned violent crime, threatened the integrity of local law enforcement, and condemned countless thousands of young lives to the service of a chemical compulsion. "Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows." S.Rep. No. 225, 98th Cong., 1st Sess. 191, *reprinted* in 1984 U.S. Code Cong.

& Ad. News 3182, 3374. The Comprehensive Forfeiture Act represents, above all, Congress' attempt to "strip these offenders and organizations of their economic power," and the recognition that "forfeiture is the mechanism through which such an attack can be made." *Id.*

The unwarranted creation of an outright constitutional ban on fee forfeiture will not only restrict the scope of Congress' past efforts to address this problem; it will eliminate future legislative flexibility to deal with fee forfeiture in different ways. This would be an unwarranted judicial intervention into the legislative arena. The fact that judicial balancing of societal and individual interests is regularly and properly employed in areas of constitutional rights and liberties does not lessen the fact that balancing of personal and public interests is presumptively a matter of legislative prerogative. Absent a constitutional right, which we have not found to be present here, the balancing of public and private interests is for Congress under its enumerated powers and for state legislatures under their residual police powers.

Indeed, we recognize that upon weighing the interests involved here, Congress could well decide that exemption of attorneys' fees from forfeiture is the wisest course. Many substantial arguments can be made for such a result. Congress may decide that public defenders would be overburdened by additions to their caseloads that fee forfeiture may cause, or that the present public compensation scheme for appointed attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A, is inadequate to finance CCE defenses. It may be too that Congress will perceive specialized private law firms as uniquely capable of undertaking lengthy and complex CCE defenses. Investigation may show that the threat of fee forfeiture has caused withdrawal of counsel and disruption of trials. Congress might find that the potential for conflicts of interest and chilling of attorney-client communications are entitled to substantial weight. Each of these concerns, however, requires ex-

actly the type of inquiry that Congress through empirical investigation and public hearings is empowered to conduct. Choices concerning the relative roles of public defenders, appointed counsel, and the private bar in CCE defenses are classic legislative matters. Every policy debate is not a constitutional debate, and the fact that lawyers are involved does not definitively mark a controversy as one of exclusive judicial competence.

Congress may also conclude that important public interests support fee forfeiture. First, the government claims a strong interest in deterrence that is served by fee forfeiture. It is true that no one engages in crime solely to make money to hire attorneys. Yet the drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less apprehensive about continuing in his business. Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.

Also at stake in the forfeiture debate are the effects on the bar and on the public's perception of the administration of justice. Of course, we are not concerned here with sham transfers to attorneys—these are obviously forfeitable. Even with regard to actual fees, however, there may be problems with a rule that allows attorneys to knowingly profit from money made in the drug trade. *See* Merkle, *Are Prosecutors Invading the Attorney-Client Relationship?*, 71 A.B.A.J. 38, 19 (1985). Insulation of legal fees from forfeiture could also make it far easier for attorneys to become involved in organized crime as ongoing legal advisers, rendering legal advice to help drug violators thwart investigations and avoid indictments.

The effect of such a trend on the legal profession may be anything but salutary. Public confidence in the admin-

istration of justice might be a casualty of exempting attorneys' fees from forfeiture. Public cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege. We cannot foresee what different approaches Congress may take toward the problem of fee forfeiture. The interests on each side of this controversy are weighty and profound. We believe, however, that this is not a debate that should be silenced by judicial fiat.

VIII.

The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money, which there is probable cause to believe is illicit, entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense.

The order of forfeiture in this case is subject only to the rights of third parties as they are specifically defined by Congress in 21 U.S.C. § 853(n). The judgment of the district court, exempting appellee's fees from the order of forfeiture, is hereby

REVERSED.

WIDENER, Circuit Judge, concurring:

I concur in Judge Wilkinson's majority opinion without reservation.

I would add, however, that I think we lend too much dignity to this claim.

Reckmeyer admittedly was represented by capable, paid attorneys throughout all stages of his criminal prosecution.

Whatever he has suffered has not been for lack of counsel of his choice. Reckmeyer, therefore, has not suffered any loss of any Sixth Amendment right to counsel.

Any substantive rights Caplin & Drysdale may have to the money which was seized by the government prior to Reckmeyer's unlawful payment to Caplin & Drysdale, in violation of the attachment order, can rise no higher than Reckmeyer's right. Since Reckmeyer had no Sixth Amendment right at the time of the payment to Caplin & Drysdale, then Caplin & Drysdale should have no Sixth Amendment right to assert in this proceeding.

Left to my own devices, I would not reach any constitutional question which may be involved and would simply reverse.

I am outvoted, however, by my colleagues on my theory of the case, and therefore I join Judge Wilkinson's opinion.

MURNAGHAN, Circuit Judge, concurring:

Judge Wilkinson has said nearly all there is to be said and, in concurring, I do not wish to be viewed as departing from him in any substantial way. On the contrary, I merely wish to add one or two thoughts which may have a bearing on the subject which is one of wide interest and considerable importance.

The first is not a problem directly involved in the current case. However, it is a matter of continuing importance which, should it arise, would considerably limit or alter the opinion expressed in Judge Wilkinson's effort. The opinion assumes that Criminal Justice Act appointments of counsel for indigent defendants sufficiently satisfy the constitutional guarantee of adequate representation of counsel. However, there has always been a tension to this assumption because the rate scale for appointees under the Criminal Justice Act tends to linger, sometimes substantially, behind the "going rate". If the gap between what the government will provide to an indigent defendant

so that he or she can make a respectable defense and the market rate for a respectable defense reaches a significant point, much of the rationale of Judge Wilkinson's opinion will have been undercut. Research of the question of adequacy of compensation to court appointed counsel involves many diverse and complicated questions. On the one hand, it will be distasteful for the government to set a fee scale interfering with the private right of defense lawyers to set their fees at whatever level they deem appropriate. Normally in a free market participants are free, even encouraged, unilaterally to set prices. Also, lawyers may be expected to resist to the end any approach which involves assignment to represent a defendant when the lawyer would prefer not to assume the defense. On the other hand, letting anyone, lawyer or other person, unilaterally to fix the price in an area infused with a great public interest has obvious disadvantages. These multi-fold questions are manifestly ones for the legislature initially. However, paying lawyers inadequately has drawbacks, especially when other contractors, say for the construction of government buildings, would be astonished and indignant if asked to perform the work on a non-compensatory basis. Should the adequacy of counsel's compensation reach a level of constitutional inquiry, the underpinnings support for Judge Wilkinson's opinion, excellent as it is as things now stand, may require reexamination.

On a second subject, there is the consideration implicitly present in all situations such as the one faced by Caplin and Drysdale Chartered here, that the defendant may be innocent or at least has not been proven guilty at the time the lawyer is approached with a view to retaining him or her (or them) to undertake a defense. The lawyer's creed, formerly common, that the practice of the law is not, or at least not primarily, merely a money grubbing business tends to suffer somewhat when counsel, faced with the necessity of appearing on a contingency basis, screams "constitutional" violation. After all, if the case develops

in a way favorable to the defendant, the forfeiture or the attempt at forfeiture may be voided, and the funds that had been noticed for forfeiture would, therefore, be available to meet legal fees.[1]

The fact that perhaps the contingency is too risky financially to be attractive should not alert constitutional considerations. Indeed, when the shoe is on the other foot, some lawyers engaged in personal injury practice will not willingly represent a potential client even though he or she is quite sufficiently endowed with adequate funds to meet the lawyer's charges on an hourly fee basis and would prefer to do so. Instead, some such lawyers have been known to insist only on doing such work on a contingent fee basis, presumably because, overall, the likelihood of success is great and, when all the cases are jumbled together, the contingency fee at perhaps 30% or more of recovery is more attractive to the lawyers than a fixed hourly fee from a fully solvent plaintiff. Indeed, the American Bar Association's Standing Committee on Ethics and Professional Responsibility in its informal opinion 1521 (1986) went so far as to state that it was unethical for a lawyer not to offer prospective clients alternative fee arrangements before accepting a case on a contingent-fee basis. One rationale was that the fiduciary nature of the relationship requires the lawyer to discuss with the prospective client who can pay a fixed fee the alternative of doing so before accepting a contingent-fee arrangement. *See* Model Code of Professional Responsibility DR 2-106

[1] It should be emphasized that in alluding to the contingent fee I am in no way attempting to diverge from the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. I am aware that both the Model Code and Model Rules prohibit a contingent fee in a criminal case. Model Code of Professional Responsibility DR 2-106(C) (1980); Model Rules of Professional Conduct Rule 1.5(d)(2) (1983). I write at the constitutional level; I did not feel a contingent fee would be unconstitutional. I in no way mean to imply that on another level ethical principles might not evolve which would outlaw contingency in fees.

(1980); Model Rules of Professional Conduct Rule 1.5 (1983).

In short, lawyers hardly had a *constitutional* basis for saying they were entitled to insist on contingent fee bases before undertaking representation in accident cases. By a similar token, protection against a requirement, in effect, that they take representation on a contingency fee basis alone does not seem to rise to the constitutional level.

JAMES DICKSON PHILLIPS, Circuit Judge, dissenting:

I agree with the court's holding that the appellee-lawyers have standing in this case to challenge the statutory forfeiture provisions, and that, as written, those provisions reach property contracted for or paid as attorney fees just as any other property made subject to forfeiture by the provisions.

For reasons expressed in the superseded panel opinion, 814 F.2d 905, 918-27, however, I dissent from the court's further holding that the forfeiture provisions, as applied to such property, violate no constitutional right of the defendant. I would hold instead that to the extent those provisions permit the government to deprive the defendant in a criminal case of the ability to pay legitimate and reasonable attorney fees for his defense against the underlying criminal charges, they violate this specific sixth amendment right.[1] On that basis, I dissent from the court's judgment.

Having already expressed my views on the constitutional issue, there is no need to repeat them here in detail and

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[1] As indicated in the panel opinion, 814 F.2d at 927, such a holding obviously would not prevent forfeiture of assets transferred to attorneys in fraudulent or sham transactions, nor would it prevent any forfeiture that leaves a defendant with sufficient untainted resources to pay reasonable attorney fees.

I adopt the relevant portions of the vacated panel opinion as the basis of my dissent here. I have only a few additional thoughts prompted by the en banc court's constitutional analysis.

That analysis rightly focuses on the qualified right to counsel of choice as the particular aspect of the multifaceted sixth amendment right ultimately implicated by these forfeiture provisions. As I read the court's opinion, it holds that Congress does not violate this right by allowing government prosecutors to prevent RICO and CCE defendants (or imminent defendants) from using allegedly tainted financial resources with which, barring governmental action, they would be able to hire and retain private counsel to defend them against those charges. This is said to be so for several reasons which simply bespeak the severely qualified nature of this particular right.

First, there is the fact that by its very nature this constitutional right of an accused person—uniquely among those protected in the bill of rights—is dependent upon the possession of financial resources with which to exercise it. Seizing on this undoubted irony, the majority points out that a defendant does not have the resources to exercise the right, hence has no right, when the government has already, by the relation-back feature of these forfeiture provisions, asserted a paramount interest in the resources.

With all respect, this simply begs the constitutional question rather than answering it. Indeed, the ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right must yield here to countervailing governmental interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them.

Under developed principles defining the qualified right to counsel of choice, the dispositive issue is whether there

are countervailing governmental interests that do justify the drastic expedient of freezing and ultimately forfeiting the assets of RICO and CCE defendants to the point that they cannot retain private counsel for their defense. The majority, accepting the government's arguments, first finds comfort for such defendants in the fact that other guarantees in the sixth amendment insure that even if the government effectively reduces them to indigency, they will be entitled to appointed public counsel who will then be held to minimal standards of effective assistance. By this, the majority necessarily announces the general principle that the constitutional right to private counsel of choice actually hangs on the thread of unconstrained legislative indulgence; that the only effective constraint on the legislative branch is that it may not deny defendants the back-up right to the minimally effective assistance of appointed public counsel.[2]

With the right to counsel of choice reduced to such modest dimensions, it may be thought fairly easy to discern countervailing governmental interests that justify its obliteration for the particular classes of defendants targeted by this legislation. Of course it is to the special quality and enormity of these crimes—organized drug dealing and racketeering on the grand scale—that Congress understandably looked in justifying the wide-ranging across-the-board criminal forfeiture provisions. And it is to the same factors that the majority now looks to find justification for the special impact of these provisions upon RICO and CCE defendants' ability to retain counsel for their defense, a special impact which, interestingly—as we all agree—Congress itself did not consider, at least so far as the statutes and legislative history reveal.

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[2] This case of course only deals with the sixth amendment rights of RICO and CCE defendants. But the majority's analysis of the tenuous nature of the right to private counsel of choice as against the government's powers of forfeiture obviously sweeps wider.

Of course these particular crimes are enormous in their dreadful consequences for our society, and their perpetrators utterly despicable. I am prepared to accept that the depredations of organized crime, particularly those involving drug dealing in contemporary society, rank just behind human slavery among the sorest domestic afflictions of our history. But I do not believe that the enormity of particular crimes and types of criminal activity and the despicability and power of particular types of criminals can properly be weighed in this particular constitutional balance. In my view, the right to private counsel of choice guaranteed by the sixth amendment cannot be made to turn on how bad the particular crime or criminal may be, but that, I think, is the linchpin of the majority's constitutional analysis.[3]

For these reasons, I remain persuaded that the sixth amendment prevents governmental freeze orders and forfeitures whose effect is to deprive criminal defendants of their ability, otherwise present, to employ private counsel for their defense against the underlying charges on which the freeze order or forfeiture is based.

HARRISON L. WINTER, C.J., and SPROUSE and ERVIN, JJ., have asked to be shown as joining in this dissenting opinion.

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[3] Judge Murnaghan apparently finds additional comfort in the fact that the forfeiture provisions simply put criminal defendants and their lawyers in the same position as that of civil plaintiffs and their lawyers operating under contingent fee contracts. The constitutional irrelevance of that analogy is so obvious that, with all respect, one wonders if the real thought is not that there are also bad lawyers to be taken into account in assessing the governmental interests at stake. Of course Congress advanced no such justification, and there is nothing in this record to support such a view. In any event, the constitutional infirmity I would find would reward no such lawyers.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 86-5025, 86-5050 and 86-5069

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEON DURWOOD HARVEY,
Defendant-Appellant,

v.

National Association of Criminal Defense Lawyers (NACDL); National Legal Aid and Defender Association (NLADA); and American Bar Association (ABA),
Amicus Curiae.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CAPLIN & DRYSDALE, CHARTERED,
Claimant-Appellee,

and

CHRISTOPHER F. RECKMEYER, II;
ROBERT BRUCE RECKMEYER,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RONALD BURNELL BASSETT
a/k/a Ronnie Bump, a/k/a The Kid, a/k/a Zachary Jackson, a/k/a Ronald Jackson, a/k/a Beamon Jackson, a/k/a Ronald Jones, a/k/a R.F. Jones, a/k/a Beamon West, a/k/a Harry VanDyke, a/k/a The Bird;

CLARENCE MEREDITH
a/k/a Yo, a/k/a Magic, a/k/a/ Houdini, a/k/a Uncle Willie,
Defendants-Appellees.

Argued Sept. 4, 1986.
Decided March 6, 1987.

Before PHILLIPS, ERVIN and CHAPMAN, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

These three cases, consolidated for purposes of appeal, present important issues respecting the forfeiture provisions of the Comprehensive Forfeiture Act of 1984, ch. 3, Pub.L. No. 98-473, §§ 301 *et seq.*, 98 Stat.1976 (1984) (the Act) (codified at 18 U.S.C. § 1963 (RICO) and 21 U.S.C. §§ 848, 853 (CCE)).

In two of the cases, Nos. 86-5069 and 86-5050, the government appeals district court orders exempting legitimately contracted attorney fees from forfeiture; in the third case, No. 86-5025, the defendant appeals his conviction on the basis that pre-trial restraining orders which forced indigency upon him violated his sixth amendment right to counsel and his fifth amendment right to procedural due process.

Together, the appeals require us to consider (1) whether Congress intended by the Act to authorize pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted by defendants to be paid as attorney fees, on the basis alone that the attorney had reasonable cause to believe that the property was subject to forfeiture upon defendant's conviction; (2) if so, whether such an application of the Act would violate either or both the constitutional right to counsel secured to defendants by the sixth amendment, and the associated right to a fundamentally fair trial secured by the fifth amendment; and (3) whether, in any event, post-indictment *ex parte* restraints on transfers of property, as permitted by the Act solely on the basis of allegations in the indictment, without any opportunity for immediate post-restraint hearing, violate fifth amendment rights to procedural due process.

We hold that the Act was intended by Congress to permit such pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted to be paid as attorney fees, but that such an application violates the qualified right to counsel of choice secured by the sixth amendment. We further hold that post-indictment *ex parte* restraints on property transfers, as permitted by the Act, violate fifth amendment procedural due process rights where no opportunity for an early post-restraint hearing is afforded but that here the error of entering such an order was harmless and, in any event, no basis for reversing the conviction.

On this basis, we affirm the orders exempting legitimate attorney fees from forfeiture in Nos. 86-5069 and 86-5050 and the criminal conviction in No. 86-5025.

I

The Act significantly revised existing forfeiture provisions in the RICO and CCE statutes by expanding the

reach of forfeiture in relation to offense, the types of property subject to forfeiture, and the time frame within which ownership of property subjects it to forfeiture; by liberalizing the provisions for restraining orders or injunctions against transfers of potentially forfeitable property; and by providing a procedure by which third parties can assert, after a defendant's conviction, their interest in property subject to forfeiture. We summarize and briefly analyze those provisions most salient to these appeals.[1]

New 18 U.S.C. § 1963(a)(3) adds[2] to the basic reach of the forfeiture provisions "(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." This expanded the reach of the forfeiture provisions from property "associated with" the criminal enterprise to include as well "property derived from the profits" of the criminal enterprise.

New subsection (b) makes clear that all types of property within the defined reach of the Act is subject to forfeiture:

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[1] For convenience, the specific references and citations we use are to the RICO forfeiture provisions, but because these are virtually identical to the CCE provisions the references serve for both.

[2] Subsection (a) previously reached only, and still reaches:

> (1) any interest the person has acquired or maintained in violation of section 1962; [and]
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source or influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Even more critical than these expansions of forfeiture's reach and of the types of property subject to forfeiture, and most critical to the issues before us, is a new provision that the government's interest in property subject to forfeiture arises at the time the charged offense is committed rather than, as formerly, at the time of the defendant's conviction. Subsection (c) now provides that:

> (C) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

This "relation-back" provision was designed to close a loophole in the existing statutes that had permitted defendants to escape *in personam* forfeiture by transferring assets to third parties before conviction. S.Rep. No. 225, 98th Cong., 1st Sess. 200-01, *reprinted in* 1984 U.S.Code Cong. & Ad.News, 3182, 3383-84 [hereinafter cited as Senate Report].

The rights of third parties who claim an interest in property sought to be forfeited are now provided in new

subsections (j) and (m). Subsection (j) prohibits third parties from intervening in the trial or appeal of a criminal case involving forfeiture and from commencing an action challenging the government's alleged interest in property that has been alleged to be subject to forfeiture in an indictment on information. Subsection (m) then relegates third parties to asserting their interests in post-conviction proceedings:

> (m) . . . (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Subsection (m)(6) specifies the showing a third party is required to make to have her property relieved of the forfeiture. The court will exempt the property from forfeiture only if the third party is able to show that:

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

The 1984 amendments also broaden, in ways critical to the issues before us, the Government's power to obtain

preconviction orders restraining the defendant's use of property alleged to be subject to forfeiture. Subsection (e)(1) authorizes the Government to seek and the courts to enter injunctions and restraining orders either before or after the defendant is indicted. Such orders may issue before indictment only after notice and hearing unless the government demonstrates *ex parte* that there is a substantial probability that the property will be proven at trial to be subject to forfeiture and that giving notice would jeopardize the availability of the property for forfeiture. In that case, an *ex parte* order may be issued but it must expire within 10 days, and a hearing concerning such an order, if requested, must be held as early as possible. After indictment, however, restraining orders may be issued on the basis alone of the indictment's allegation that the property described would be subject to forfeiture upon conviction; no special judicial hearing either before or after entry of the order is required.

Together, these new RICO and CCE forfeiture provisions obviously enhance greatly the power of the government to restrain a defendant's use of his property before conviction and expand greatly the scope of assets subject to forfeiture after conviction. Each of the cases consolidated on this appeal concerns the proper interpretation and application of one or more of these new forfeiture provisions.

In each case the Government has invoked the new provisions in ways that prevent the defendants from paying (or their attorneys from receiving or retaining) agreed fees. Although the cases then raise common questions of law, each arises in a different factual setting and reaches this court in a different procedural posture that requires separate statement.

II

A.

United States v. Bassett and Meredith (Bassett)

Appellees Bassett and Meredith were indicted in the District of Maryland on December 20, 1985, for various offenses, including conducting a continuing criminal enterprise. The indictment included an allegation that Bassett and Meredith should forfeit to the United States any profits derived from their alleged enterprise. Five weeks after the return of the indictment, without seeking a restraining order, the Government notified counsel for appellees that it would seek forfeiture of fees paid them by appellees should appellees be convicted. Appellees' counsel responded by moving for an exemption of their fees from the forfeiture count, asserting that their continued representation of appellees was conditioned on receiving payment of their fees.

The district court granted counsel's motion on April 11, 1986. Although it found that the literal language of the Act appeared to permit the forfeiture of attorneys fees, the court concluded from its review of the legislative history that Congress had intended to require the forfeiture of property held by third parties only when the transfer of assets was the result of a "sham" or "fraudulent" transaction. The court stated that although the appellees' attorneys could not be accounted as "innocent as bona fide purchasers for value," they also were not merely "bogus conduits" of the defendants' ill-gotten goods. Because the attorneys received their fees as the result of an arms' length transaction, the court held that the Government could not seek the forfeiture of such fees under the Act as properly interpreted.

The district court considered that its statutory interpretation was bolstered by the sixth amendment violations threatened by a contrary interpretation. The court noted

defendants have a qualified sixth amendment right to counsel of their choice so long as they had the resources to retain such counsel. The threat of forfeiture of attorneys fees upon conviction might deprive defendants of this right by making it far less likely that an attorney would accept their case. Further, the already overtaxed resources of the public defender's office probably could not adequately handle the exceedingly complex cases it would then receive. The court also noted that in cases in which the Government threatened forfeiture the defendant might be both unable to obtain private counsel and ineligible for a court-appointed attorney. The court found it appropriate therefore to avoid these potential sixth amendment problems by interpreting the statute as not permitting the forfeiture of legal fees contracted for in a bona fide transaction.

The Government seeks a reversal of the district court's order on grounds that the court's interpretation of the statute is legally erroneous. The Government contends that the literal language of the statute permits the forfeiture of attorneys fees and that the legislative history does not support a contrary interpretation.

B.

United States v. Caplin & Drysdale (Reckmeyer)

The firm of Caplin & Drysdale began its representation of defendant Christopher F. Reckmeyer in the summer of 1983, over 18 months before a grand jury investigation led to his indictment in the Eastern District of Virginia on various offenses, including a charge of operating a continuing criminal enterprise. The January 15, 1985, indictment included a forfeiture count that sought forfeiture of virtually all Reckmeyer's assets. On January 14, 1985, the day before the indictment was returned, the Government obtained an *ex parte* restraining order barring the transfer of assets covered by the indictment.

Throughout its representation to that point, Caplin & Drysdale had received regular payments from Reckmeyer, including a payment of $25,480 on January 25, 1985, the day Reckmeyer surrendered to authorities. The firm notified the court of its receipt of these funds, which were thereupon deposited in a separate escrow account. At Reckmeyer's request, the firm continued its representation of him after the indictment.

On March 14, 1985, Reckmeyer pled guilty to three counts of the indictment. The following day the court denied counsel's motion to exempt its fees from the restraining order on the ground that Reckmeyer had pled guilty to conducting a continuing criminal enterprise. Upon Reckmeyer's conviction on May 17, 1985, the court entered a forfeiture order that included virtually all of Reckmeyer's assets and the $25,480 held in escrow by Caplin & Drysdale. On June 17, 1985, Caplin & Drysdale filed a third-party claim pursuant to § 413(n) of the CCE Act asserting an interest in the amount of $170,000, representing unpaid legal fees. In it they asserted that because forfeiture of their fees would violate Reckmeyer's sixth amendment right, those fees must be exempted.

The court granted Caplin & Drysdale's motion to exempt its fees from forfeiture on March 27, 1986, 631 F.Supp. 1191. Unlike the court in *Bassett*, which found that the Government could not reach assets held by *any* third parties unless the transfer was a sham or otherwise fraudulent, the district court here found only that Congress did not intend for *bona fide* attorneys fees to be subject to forfeiture under the CCE. The court agreed, however, with the *Bassett* court's conclusion that an interpretation of the statute that permitted the forfeiture of attorneys fees would violate the defendant's sixth amendment rights to counsel of choice and to the effective assistance of that counsel.

In this appeal the Government contends, as in *Bassett*, that forfeiture of legitimate attorneys fees was intended under the Act and does not in general violate the sixth amendment.

C.

United States v. Harvey (Harvey)

Appellant Harvey was indicted in the Eastern District of Virginia on October 16, 1985, for over 20 different offenses including various RICO offenses and operating a continuing criminal enterprise. The indictment included an allegation that all of Harvey's assets should be forfeited to the United States. On the same day, the Government obtained in an *ex parte* hearing a restraining order that barred Harvey from making any use of any of his property, including currency and accounts, until the conclusion of his trial and all appeals. This restraining order was then served on Harvey's attorney, John Mark of Zwerling, Mark, Ginsberg and Lieberman, P.C., who had already begun work on Harvey's case.

The court denied Mark's request that his firm be permitted to make an appearance in the case conditioned on the exemption of their fees from the restraining order. In a subsequent hearing the court also denied the firm's motion to exempt its fees from the restraining order. The court, however, acknowledged that the restraining order rendered Harvey indigent and appointed Mark's law partner, John Zwerling, to represent Harvey. A request that all four members of the firm be appointed was denied, but the court did agree to appoint two members of the firm, so long as one of them was Zwerling. The court permitted Zwerling to decide whether Mark or Lieberman would assist him.

After denial of its motion to withdraw because it lacked the resources necessary to prepare an adequate defense, counsel filed numerous motions to be allowed to retain

various experts with Criminal Justice Act funds and a motion to be allowed to utilize the assistance of another member of their firm. These motions were largely denied, although the court did permit counsel to retain an accountant and a psychiatric expert. Nevertheless, as counsel have summarized the situation in their brief, "[t]he preparation for trial bore no resemblance to the preparation that normally would and should, but could not, be undertaken prior to a trial of this magnitude."

After a three-day bench trial, Harvey was convicted of most of the charges on which he had been indicted, including the RICO and continuing criminal enterprise offenses. The district court then ordered forfeiture of all property described in the RICO and CCE counts. Harvey now seeks a reversal of his conviction on grounds that his sixth and fifth amendment rights were violated. Harvey contends that by refusing to exempt attorneys fees from forfeiture the court violated his sixth amendment right to counsel of his choice. He also asserts that the *ex parte* restraining order prohibiting use of his assets to retain counsel of his choice violated his fifth amendment procedural due process rights.

III

The threshold question presented by each of these appeals is whether Congress intended the Act to make legitimately contracted for or paid attorneys' fees subject to forfeiture and pre-conviction restraint. If Congress did not so intend, the principal substantive issue in each appeal must be resolved against the government and there will be no need for this court to address the fifth and sixth amendment issues.

As indicated, the district courts in both *Bassett* and *Reckmeyer*, relying principally upon legislative history, interpreted the forfeiture provisions of the Act as not being intended to reach property contracted for or paid as

attorney fees unless the transaction was a sham or fraudulent one intended to defeat the government's entitlement to forfeiture. Because there was no suggestion of sham or fraud in either case, the courts in both granted requested exemptions from forfeiture.

Though the *Bassett* and *Reckmeyer* courts' statutory interpretation finds support in a majority of the federal decisions to date on the point[3] we disagree with that interpretation and reject it. We think instead that the language of the relevant forfeiture provisions is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history to resolve ambiguity on the point or to avoid a manifestly unintended application. Further, we think that even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language. Finally, we believe that the plain language of the forfeiture provisions does not permit a judicial interpretation that avoids the serious constitutional questions generally conceded by all to exist.

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[3] *United States v. Estevez*, 645 F.Supp. 869 (E.D.Wis.1986); *United States v. Figueroa*, 645 F.Supp. 453 (W.D.Pa.1986); *United States v. Ianniello*, 644 F.Supp. 452 (S.D.N.Y.1985); *United States v. Badalamenti*, 614 F.Supp. 194 (S.D.N.Y.1985) (expressly disagreeing with *Payden*, cited *infra*, from same district); *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985). *Contra United States v. Harvey*, No. CR-85-224-A (E.D. Va. Nov. 8, 1985) (on this appeal); *In re Grand Jury Subpoena Duces Tecum dated January 2, 1985 (Payden)*, 605 F.Supp. 839 (S.D.N.Y.1985) (expressly disagreeing with *Rogers* analysis); *see also* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va.L.Rev. 493 (1986) (arguing that forfeiture of legitimate attorneys' fees was intended by Congress) [hereafter cited as Brickey, *Forfeiture*].

Statutory construction properly begins with examination of the literal language of a statute, *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), and it properly ends there unless the language is ambiguous, *id.*, or would, as literally read, contravene a clearly expressed legislative intention, *Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). Here, we are satisfied that the literal language of the statute is not ambiguous, that an interpretation of that language according to its plain meaning contravenes no clearly expressed legislative intent, and that such an interpretation is therefore the proper one. A simple parsing of the critical forfeiture provisions shows why.

Those forfeiture provisions have two elements. The first defines, in two ways, property interests subject to forfeiture: by relation of property to offenses charged, § 1963(a) and by kind, § 1963(b). Attorney fees are neither expressly excluded nor included; they are not mentioned. The second element then describes the only two conditions upon which property generally subject to forfeiture under §§ (a) and (b) may be exempted by third party claims of superior title: proof of title superior to that of defendant at the effective date of forfeiture, § 1963(m)(6)(A); and proof of title superior to that of the government by subsequent transfer to the claimant as a "bona fide purchaser," § 1963(m)(6)(B). Again, attorney fees are not expressly singled out for special treatment; they are not mentioned.

Simply put, the literal language of these critical forfeiture provisions unambiguously includes within the property interests that are made subject to forfeiture under §§ 1963(a) and (b) property contracted to be paid or paid as attorneys fees, and then just as unambiguously subjects such property, if subject to forfeiture, to the same conditions for exemption provided for all forfeitable property by §§ 1963(m)(6)(A) and (m)(6)(B). Property marked for or paid as attorney fees is necessarily included within that defined as subject to forfeiture by §§ 1963(a) and (b) for

the simple reason that those provisions define forfeitable property without regard to its intended or actual use, whether for payment to attorneys or for other uses. Similarly, the conditions for exemption by virtue of superior title are defined in §§ 1963(m)(6)(A) and (B) without reference to the professional or other status of title claimants. Under the literal language of the forfeiture provisions, therefore, property contracted to be paid or paid as attorney fees may first be included as forfeitable property and may then not be subject to exemption, depending solely upon the particular facts that determine inclusion and exemption of property in general.

While recognizing that these critical statutory provisions seemed literally to contemplate the forfeitability in some cases of property legitimately marked for or paid as attorney fees, the district courts in *Bassett* and *Reckmeyer* nevertheless rejected that interpretation. *United States v. Bassett and Meredith*, 632 F.Supp. 1308, 1311 (D.Md.1986); *United States v. Reckmeyer*, 631 F.Supp. 1191, 1195 (E.D.Va.1986); *see also United States v. Badalamenti*, 614 F.Supp. 194, 196 (S.D.N.Y.1985). Instead, they held forfeiture was intended by Congress only when the attorney fee transaction could be shown to be a sham or fraud designed to defeat the government's forfeiture rights. To reach this conclusion these courts resorted to legislative history and found there a congressional intention to exempt such property.

As indicated, this conclusion has also been reached by a majority of the other district courts that have addressed the issue. It cannot, therefore, lightly be discounted. Indeed the near unanimity to date of district courts in rejecting a literal interpretation of this important federal statute is rather remarkable in itself. Certainly it bespeaks a substantial and widespread concern by these base-line federal courts with the practical and policy implications of a literal interpretation. In effect, these courts seem to be saying that they simply cannot believe that Congress could

have intended, despite the statute's literal import, that these forfeiture provisions reach legitimately contracted attorney fees, given the impact of such an interpretation upon the ability of defendants in criminal cases to arrange privately for their defenses.

Without discounting the practical and policy concerns expressed by these courts, we nevertheless cannot agree with their conclusion. We believe instead that legislative history confirms that Congress indeed intended, as the Act literally provides, that property legitimately contracted for or paid as attorney fees might be forfeitable in particular cases.

The courts that have found a contrary legislative intent have found that intent principally in passages of legislative history related to the "bona fide purchaser"[4] exemption provisions of §§ 1963(c) and (m)(6)(B). These courts have emphasized that, for extrinsic reasons, these provisions actually disfavor attorneys in relation to all other transferees. By virtue of their special knowledge and relationships with defendants, attorneys are more likely than any other type of transferee to be unable to satisfy the condition that they be "reasonably without cause to believe that the property was subject to forfeiture." This special disadvantage created *sub silentio* by the statutes' failure to single attorneys out for preferential treatment as trans-

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[4] Defendants seek without great zeal to make something of the ambiguity of the term "purchaser" as applied to "sellers" of services such as attorneys. In this, however, they meet themselves coming back, for attorneys must qualify as "purchasers" in order to invoke the exemption provisions of the Act. In any event, legislative history makes it plain, if resort to it were required, that "purchasers" in this context was intended to apply to providers of services as well as to other transferees for value. *See* Senate Report at 200 n. 28, 1984 U.S. Code Cong. & Ad. News at 3383 (citing with approval *United States v. Long*, 654 F.2d 911 (3d Cir.1981), which upheld forfeiture of property transferred as attorney fees under pre-indictment Act, as illustrative of intended operation of relation-back provision of amended Act).

ferees has been the principal point then seized upon by courts in rejecting a literal reading of the statutes. The perceived anomaly of making attorney fees specially vulnerable to rather than specially protected from forfeiture by this means has seemed to these courts so great and so threatening to constitutionally secured rights to counsel as to justify the search for a contrary or limiting intent in legislative history.

The principal passages relied upon and the basis upon which courts, including the district courts in *Bassett* and *Reckmeyer*, have found in them a legislative intent at odds with a literal reading of the statutes can be briefly summarized. A portion of a Senate Report, referring to the provision in § 1963(m)(6)(B) for proof by third persons of "bona fide purchaser" status, explained in a footnote that

> The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in [§ 1963(c)]. . . .

Senate Report at 209 n. 47, 1984 U.S.Code Cong. & Ad. News at 3392 n. 47.

Another portion of that Report referring to the relation-back provision of § 1963(c) and its effect upon subsequent transfers, explained that

> The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions.

Senate Report at 200-01, 1984 U.S.Code Cong. & Ad.News at 3383-84.

Finally, the House Judiciary Committee, in the course of describing the intended purpose and workings of pre-trial restraining orders under related forfeiture provisions in the Comprehensive Drug Penalty Act of 1984, stated that "[n]othing in this section is intended to interfere with a person's Sixth Amendment Right to counsel." H.R.Rep. No. 845, part 1, 98th Cong., 2d Sess. 19 n. 1 (1984) (House Report).

From these passages the district courts in *Bassett* and *Reckmeyer*, following other district courts, found a legislative intent to confine the forfeitability of attorney fees to situations where the fee transaction was "a sham or fraudulent" one designed to avoid forfeiture by using the attorney as a mere conduit for shielding the property. *See Bassett*, 632 F.Supp. at 1315-16; *Reckmeyer*, 631 F.Supp. at 1195. Under this construction Congress intended that attorney fees should not be subject to pre-trial restraining orders or to ultimate forfeiture so long as the fee transaction was conducted "at arms length and not as . . . part of an artifice or sham to avoid forfeiture." *United States v. Rogers*, 602 F.Supp. 1332, 1348 (D.Colo.1985). In coming to this conclusion, the courts have expressly relied upon a belief that such a limiting interpretation was compelled as to attorney fees to avoid serious constitutional questions respecting the right to counsel. *Bassett*, 632 F.Supp. at 1316-17; *Reckmeyer*, 631 F.Supp. at 1194-98.

The upshot of such an interpretation is flatly to read out of the "bona fide purchaser" provision the literal requirement that attorneys, like all claimants, be without reasonable cause to believe that their fees might be payable out of property subject to forfeiture, and to substitute the much more modest requirement that the fees shall have been legitimately contracted for legal defense services, without regard to the attorney's knowledge of the possible taint of the fees' source. As indicated, we do not believe that such a drastically narrowing interpretation can be justified, either on the basis of resolving facial ambi-

guity in the statutes, or of rejecting a literal interpretation that contravenes a clearly expressed legislative intent, or of avoiding serious constitutional questions.

The statutory provisions are simply not facially ambiguous, as our parsing of the critical language has demonstrated. Courts that have found an opening wedge of ambiguity have found it not in what the provisions *say*, but in what they do *not* say, *see Reckmeyer*, 631 F.Supp. at 1195 (no express mention of counsel fees); *Bassett*, 632 F.Supp. at 1131 (no express indication of how "without cause to believe" requirement applies to special case of defense counsel), or in the perceived anomaly of applying what the provisions literally say to permit forfeiture of attorney fees, *see Badalamenti*, 614 F.Supp. at 196 ("would raise . . . constitutional and ethical problems").

But this will not do. It is an elementary and profoundly important canon of statutory construction that ambiguity cannot be bootstrapped in these ways. "The proper function of legislative history is to solve, and not create an ambiguity." *United States v. Rone*, 598 F.2d 564, 569 (9th Cir.1979) (citing *United States v. Blasius*, 397 F.2d 203, 206 (2d Cir.1968)); *see also Ex Parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947-48, 93 L.Ed. 1207 (1949) ("plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction . . . , may furnish dubious bases for inference in every direction").

Nor do the passages of legislative history relied upon by those courts reveal a clearly expressed legislative intention that would be contravened by applying the provisions according to their literal language. Rejection of the literal interpretation is therefore not justified under the venerable principle applied in such cases as *Russello*, 464 U.S. at 20, 104 S.Ct. at 299; that mandates deference to a clearly expressed legislative intention when that intention would be undercut by a specific application of a statute's literal import.

Though both of the first two quoted excerpts from legislative history do emphasize that a central concern behind the relation-back provisions was to void sham and fraudulent transfers, they cannot fairly be read to identify this as the exclusive concern. A legislative intent more restrictive than that reflected in the literal sweep of a statute cannot be inferred from the fact alone that the statute as plainly written sweeps more broadly than the central concern that prompted its enactment. *See, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-11, 100 S.Ct. 2051, 2057-58, 64 L.Ed.2d 766 (1980) (that statute literally affects broader range of conduct than the conduct of principal concern to Congress does not justify interpretation restricting application to conduct of principal concern); *United States v. Lee*, 726 F.2d 128, 131 (4th Cir.1984) (plain meaning of statute cannot be avoided "merely by showing that Congress . . . was largely concerned with a [different type of specific conduct]").

That Congress' concern ran more broadly than just to sham and fraudulent transfers is in fact the much more plausible reading of the whole of the relevant legislative history. For example, the first portion of legislative history quoted above was a footnote to a passage of text in the Senate Report that reflected the wider concern by simply citing the text of the "bona fide purchaser" provision as defining one of the two bases upon which a third party claim of superior title might prevail. In this context, the footnote is best read as simply emphasizing that sham and fraudulent transfers would obviously fall within the category of voidable transfers.[5]

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[5] Perhaps significantly, the influential opinion in *Rogers*, 602 F.Supp. at 1332, was able to find in this passage an exclusive concern with

Even more telling is another passage of the Senate Report explaining the need for adding the relation-back provision to then current RICO forfeiture provisions.

> The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, *simply by transferring an asset to a third party*, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.
>
> In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture.

Senate Report at 196; 1984 U.S.Code Cong. & Ad.News at 3379 (emphasis added).

This passage reflects a clear congressional intent to make voidable a wider range of asset transfers than just sham or fraudulent ones. Certainly the thought reflected is not contravened by the literal language of §§ 1963(c) and (m)(6)(B) which makes voidable all transfers except those to persons who qualify as "bona fide purchasers" in the

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sham and fraudulent transactions by expressly implying in it a critical thought not literally expressed. *Id.* at 1347 (quoting: "The provision should be construed to deny relief [only] to third parties acting as nominees or who have knowingly engaged in sham or fraudulent transactions.") (bracketed insertion by the court).

classic sense of being "without notice," a state of knowledge or belief obviously short of being "without fraud."

We are therefore persuaded that the legislative history reflects no clearly expressed intention that attorney fees should only be forfeitable when based on "sham or fraudulent" transactions or when not negotiated "at arms length." The plain language of the statute cannot therefore properly be rejected on the basis that it contravenes any contrary legislative intent to be found in legislative history. And to the extent that the district courts in *Bassett* and *Reckmeyer* thought that the statutes' plain language must be rejected to avoid an anomalous result in regard to attorney fees, "[t]he short answer is that Congress did not write the statute that way." *North Carolina Department of Transportation v. Crest Street Community Council*, ___ U.S. ___, 107 S.Ct. 336, 341, 93 L.Ed.2d 188 (1986) (quoting *Garcia v. United States*, 469 U.S. 70, 79, 105 S.Ct. 479, 485, 83 L.Ed.2d 472 (1984) (quoting *Russello*, 464 U.S. at 23, 104 S.Ct. at 300 (quoting *United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 2082, 60 L.Ed.2d 624 (1979)))).

Finally, that the forfeiture provisions raise serious constitutional questions does not justify a saving interpretation in these cases. The familiar and important principle is that when a statute is fairly susceptible to more than one interpretation, the interpretation most consistent with constitutionality should be adopted. *See, e.g., United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545-46, 97 L.Ed. 770 (1953). But this of course contemplates that the statute be sufficiently ambiguous to permit a judicial choice between more than one permissible reading. *Id.* at 45, 73 S.Ct. at 545 (choice between "fair alternatives" must favor that which avoids serious constitutional questions); *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932) ("cardinal principle that . . . Court will first ascertain whether a construction . . . is fairly possible . . . by which the [constitutional] question may be avoided");

see also 2A Sutherland, *Statutory Construction* § 45.05 at 15-16 (courts not free to interpret in violation of congressional intent even if only so may constitutionality be preserved).

Here, as our discussion of the plain meaning of the critical provision has shown, the statutory language simply presents no opportunity for choice between "fair alternatives." The House Judiciary Committee Report referring to possible constitutional questions in respect of related forfeiture provisions does not aid defendants on this point. The cryptic statement that "nothing in this section [providing for pre-trial restraining orders] is intended to interfere with a person's Sixth Amendment Right to counsel" obviously does not alter what the forfeiture provisions say. To the extent it is at all relevant to consider the significance of this statement, its probable meaning and purpose are too unclear to aid statutory interpretation. It may reflect no more than a reassuring political gesture to members of Congress concerned about possible constitutional problems. It may merely disclaim any intention to enact legislation thought to be unconstitutional, or it may merely express a belief that the provisions as written do not violate constitutional rights or that specific applications will of course be subject to constitutional challenge in the courts. On no possible reading could this comment be taken as a clearly expressed congressional intention that attorneys fees should only be forfeitable when based upon sham or fraudulent transactions.

For these reasons[6] we disagree with the statutory interpretation of the district courts in *Bassett* and *Reckmeyer*

[6] Because we consider these reasons sufficient, we need not address the disputed question whether this court's pre-amendment decision in *United States v. Raimondo*, 721 F.2d 476 (4th Cir.1983), has already decided, with binding effect upon this panel, that Congress intended by the Act to subject attorney fees to forfeiture on the same basis generally controlling third party transfers.

and affirm that of the district court in *Harvey*. With the latter court, we hold that the critical provisions must be interpreted according to their literal import and that this contemplates the forfeiture of attorney fees in any circumstances where the attorney cannot establish that he was "without reasonable cause to believe that the property [used to pay the fees] was subject to forfeiture."

IV

Having decided that the Act contemplates no special exemption of attorneys' fees from forfeiture, we turn to the issues whether and to what extent the constitution nevertheless compels such an exemption, and whether the Act provides constitutionally sufficient procedural protections in connection with the forfeitures and restraints on property transfers that it allows. A preliminary analysis of the parties' constitutional contentions may help to narrow the scope of these difficult issues and to put them in proper perspective for discussion.

First off, the defendants' constitutional challenge is a multi-faceted one which involves both substantive and procedural rights. In essence, though they do not put it just this way, defendants claim that when the government proceeds under the Act—whether by order or threat—to deprive defendants of the right to transfer property to pay legitimate attorneys' fees, two distinct though contextually intertwined substantive rights are implicated: the right to hold and use property free of governmental deprivation without the due process guaranteed by the fifth amendment, and the right to counsel guaranteed (primarily) by the sixth amendment. And they assert that because substantive property rights are implicated, so necessarily are procedural due process rights in connection with deprivations of that property.

The government does not—could not—contest that substantive property rights and concomitant procedural due

process rights are necessarily implicated by the forfeiture and restraint provisions of the Act. This is a self-evident proposition without regard to the intended use of the property—whether to pay attorneys fees or otherwise. Indeed, the Act reflects awareness of the need to provide procedural due process in connection with property deprivation, whatever the property's use and whether the deprivation is by pre-conviction restraining orders or post-conviction orders of forfeiture. As to the procedural right, however, the government of course takes the position that the Act's procedural protections supply the process due. Defendants on their part do not challenge the adequacy of the procedural protections except to the extent that the defendant in *Harvey* seeks to challenge the procedures provided in respect of post-indictment restraining orders.

In sum, no one questions that fifth amendment procedural due process rights are implicated by restraining orders and forfeiture orders affecting a defendant's property contracted or paid as attorneys fees. The only dispute touching those rights is that in *Harvey* as to the adequacy of the procedures provided in conformity with the Act for the post-indictment restraining order in that case.

The much more difficult issue is whether any sixth (or fifth) amendment substantive right to counsel independent of the unquestioned property right is also implicated by restraining orders and forfeiture orders directed at attorneys' fees. As to this, the government contends that no such right to counsel is implicated, at least not by the Act as written and as applied in these cases. Conceding that specific misapplications of the Act might involve arbitrary or overreaching conduct by the government in violation of the fifth amendment right to a fundamentally fair trial, or outright denials of counsel or the effective assistance of counsel in violation of the sixth amendment, the government contends that no such claim has been made or could be made in any of these cases. In any event, the government asserts, no outright denial of counsel, or in-

effective assistance of counsel, or fundamentally unfair trial claim could properly be entertained until after conviction had laid the basis for assessing (or, in respect of an outright denial claim, assuming) actual prejudice. Furthermore, even if it be assumed that in strict conformity with the Act, defendants might be made financially unable to employ private counsel by virtue of restraining orders, this would not involve the outright denial of counsel, given the right to appointed counsel by virtue of indigency that would then arise (as actually occurred in *Harvey*). Finally, the government contends that restraining and forfeiture orders under the Act implicate no sixth amendment right to counsel of choice. That right, according to the government, is a stringently qualified one that has been recognized only in exceptional circumstances not present here. Its limits in any event are found in sufficiently countervailing governmental interests, which are present here in the necessity to prevent the pre-conviction concealment and dissipation of forfeitable property and concomitantly to cut off the economic base for further criminal activity by defendants.

The defendants contend to the contrary that the Act's forfeiture provisions as literally applied to attorneys' fees do implicate sixth amendment rights to counsel independently of any fifth amendment procedural due process rights respecting property deprivation. Essentially they argue that the mere potential under the Act for restraining orders and forfeiture orders affecting the payment of attorneys' fees (not to say any actual restraints and forfeitures) immediately and necessarily violates sixth amendment rights to counsel of choice and to the effective assistance of counsel by its *in terrorem* effect upon counsel and counsel-client relationships. Furthermore, they say that in some circumstances, the Act as written may operate to deny *any* counsel when, as may well occur, private counsel are all deterred by the prospects of forfeiture but defendant cannot qualify by indigency for appointed counsel.

We will take the right to counsel and procedural due process issues in that order.

A.

The courts and commentators that have considered the matter, the Justice Department, and the American Bar Association generally seem to have agreed that forfeiture of attorney fees may at some point run afoul of sixth amendment rights to counsel and, possibly, congruent fifth amendment rights to a fundamentally fair trial. Every court which to date has interpreted the Act as not intended to reach attorneys' fees untainted by sham or fraudulent transactions has done so on the basis, in part, that wider forfeiture would at least raise serious sixth amendment questions which should and can be avoided.[7] The Justice Department, while maintaining that "there are no constitutional . . . prohibitions" to the wider forfeiture of attorney fees in accordance with the Act, has nevertheless, in obvious response to court decisions and objections by the organized bar, promulgated formal guidelines designed to temper the conceded impact of forfeiture upon defense counsels' "ability to represent their clients." *Justice Department Guidelines on Forfeiture of Attorneys' Fees, reprinted in* 38 Crim.L.Rep. (BNA) 3001, 3003.[8] The

[7] *See* cases so holding cited in note 3, *supra*. Actually, several of these courts have seemed to hold alternatively that the Act, if intended to reach legitimate attorney fees, *would* violate sixth amendment rights to counsel. *See, e.g., Bassett*, 632 F.Supp. at 1317 (so to read the Act "is to violate Sixth Amendment principles"); *Reckmeyer*, 631 F.Supp. at 1196 (application of Act "to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights"); *Badalamenti*, 614 F.Supp. at 198 (if intended to reach bona fide attorney fees court would "conclude that in this application it ran afoul of the Sixth Amendment").

[8] The Justice Department guidelines are particularly interesting in their identification of the most questionable aspects of the forfeiture provisions as applied to attorney fees and in their means of ameliorating

American Bar Association, which appears as amicus curiae on this appeal, advises that it has taken formal positions opposing attorney fee forfeitures except in sham or fraud situations, and contends on this appeal that those positions are grounded in sixth amendment considerations. *Brief Amicus Curiae of the American Bar Association* 12-17. While the commentators are divided in their assessments of sixth amendment questions, none seems to have doubted that a genuine question exists.[9]

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those aspects, presumably to guard against constitutional challenges to particular applications.

In a preamble, the Department "recognizes that attorneys, who among all third parties uniquely may be aware of the possibility of forfeiture, may not be able to meet the [bona fide purchaser] requirements . . . without hampering their ability to represent their clients" and specifically, that holding attorneys to the general "without cause to believe" standard "may prevent the free and open exchange of information between an attorney and a client." *Justice Department Guidelines on Forfeiture of Attorneys' Fees, reprinted in* 38 Crim.L.Rep. (BNA) 3001, 3003.

On this basis, the Department concludes that prosecutorial discretion should be exercised in applying the forfeiture provisions to attorney fees, and adopts as Department policy that no such forfeiture will be sought without prior approval of the Assistant Attorney General, Criminal Division, pursuant to specific guidelines. In their most relevant portions, these guidelines then provide for seeking forfeiture of fees for representation in criminal matters only when there are reasonable grounds to believe that a fee transaction is a sham or fraudulent one, or reasonable grounds (not acquired from compelled disclosure of confidential communications) that the attorney has *actual* knowledge that a *particular* asset received as fees was then claimed to be subject to forfeiture or that it was obtained by criminal misconduct. Further the guidelines announce a policy against giving notice to attorneys that any assets other than those specifically identified in an indictment or restraining order are subject to forfeiture in an avowed effort to avoid challenges of interference with the qualified right to counsel of choice.

[9] *See* Brickey, *Forfeiture*, 72 Va.L.Rev. at 529-32 (sixth amendment violations may be litigable after conviction); Fossum, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs?*, 39 Sw.L.J. 1067, 1091 (1986) ("potential for constitutional vi-

There is thus general agreement that at some point action by government which effectively prevents a defendant from using otherwise available property to hire a lawyer to defend him against criminal charges could violate his constitutionally secured rights to counsel. But there is basic disagreement and considerable uncertainty among the courts and between defendants and the government in these cases about where that point may be, and specifically whether it lies within the range of government action specifically authorized by the Act.

Identifying, in general terms, "serious constitutional questions" in order to justify a saving statutory interpretation is obviously an easier and less serious judicial process than is identifying specific constitutional vices in statutes not subject to alternative interpretations. Certainly that is the case here. Despite the considerable difference between the two processes, however, a good starting point for deciding whether the Act violates specific constitutional rights is to marshal the "serious questions" about possible violations that courts have identified. The questions so identified all concern the potential impact of certain assumed consequences of the Act's application upon particular constitutionally secured rights.

The assumed consequences concern both the ability of defendants to retain private counsel under the threat of forfeiture, and the relationships between a defendant and any privately retained counsel who might undertake representation despite the threat. The primary consequences,

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olations accompanying [literal] interpretation is serious" but subject to avoidance by governmental discretion); Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 Fordham L.Rev. 1171, 1193 (1986) (concluding that application of Act to attorneys' fees "creates conflicts with the defendant's sixth amendment right to counsel," but that "the problem is not fatal to the statutes"); Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 W.Va.L.Rev. 825, 843 (1986) ("defendant's sixth amendment right to effective representation may be violated" by the [bona fide purchaser requirement]).

as assumed by other courts, as urged by the defendants and associated amici on this appeal, and as, to some extent, conceded by the government, may be summarized as follows.

Pre-conviction restraining orders and, indeed, the mere threat of ultimate forfeiture without any such orders operate directly and immediately to inhibit a defendant's ability to retain private counsel for his defense. Counsel inevitably will be reluctant or unwilling to accept private employment knowing that they may not be able to collect or retain agreed-upon fees. *See, e.g., Bassett*, 632 F.Supp. at 1316-17; *Reckmeyer*, 631 F.Supp. at 1196-97.

Forced indigency, the ultimate consequence of freeze orders, may entitle the defendant to appointed counsel, but this is no answer. The available force of public defenders and legal aid lawyers is insufficient to provide this assurance. *See Rogers*, 602 F.Supp. at 1349. In any event, freeze orders and the threat of forfeiture may in some cases result in the inability to retain either private or appointed public counsel. This would occur when no private counsel would accept employment under such conditions but the defendant could not qualify as an indigent because of the availability of some untainted assets. *See Badalamenti*, 614 F.Supp. at 197.

If private counsel is retained despite the threat of fee forfeiture, the resulting relationship between counsel and client will necessarily be compromised by conflicts of interest respecting forfeiture possibilities. To the extent counsel's right to obtain or retain fees is dependent upon his not having "reasonable cause to believe" that the source of his fee is forfeitable under the Act, a conflict of interest respecting the tolerable depth of inquiry by counsel into the defendant's conduct is necessarily created. Further, there may arise conflicts of interest respecting plea bargain possibilities involving dismissal of forfeiture counts that might preserve attorney fee sources. *See Reckmeyer*,

631 F.Supp. at 1197; *Badalamenti*, 614 F.Supp. at 196-97.

The specific constitutional rights possibly violated by these consequences have, understandably, been less certainly identified by the courts and by the defendants and their associated amici on this appeal. The following specific rights have, however, been suggested with varying degrees of precision and emphasis: the minimal or basic sixth amendment right to *some* counsel, as recognized, e.g., in *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938); the further sixth amendment right to the effective assistance of whatever counsel undertakes representation, as recognized, e.g., in *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); the further sixth amendment right to counsel of choice, as recognized in, e.g., *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932); and the related fifth amendment right to a fundamentally fair trial, specifically to a trial not made unfair by prosecutorial misconduct that unbalances the opposing forces of advocacy, as recognized in, e.g., *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211-12, 37 L.Ed.2d 82 (1973). Taking these as the only constitutional rights arguably implicated by the Act's impact on attorneys' fees, we consider them in turn.

We first consider whether freeze orders or the mere threat of forfeiture might violate the discrete right to the effective assistance of counsel or the related right to a fundamentally fair trial. As to these, we agree with the government that while in particular cases such violations might result from specific applications of the Act, this could be determined only after conviction. Before conviction, the mere possibility that particular applications of the Act might ultimately result in such violations could not then subject the Act to constitutional challenge in respect of these particular rights. *See Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71, 81 S.Ct.

1357, 1397, 6 L.Ed.2d 625 (1961) ("Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated."); *see also* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va.L.Rev. 493, 529-32 (1986) (no sixth amendment right litigable before conviction). Accordingly, no challenge to the Act, either facially or as applied, on these particular grounds lies before conviction.

We next consider whether the Act facially or by particular applications might violate the "basic" right to counsel guaranteed by the sixth amendment. We start by recognizing that this is only the right to have *some* counsel (actually, not to be denied *any* counsel). This discrete right is therefore satisfied by having either privately retained or governmentally appointed counsel. When indigency prevents the private retention of counsel, a specific right to appointed counsel thereupon arises. *Johnson*, 304 U.S. at 463, 58 S.Ct. at 1022. The worst possible effect of the Act's application upon this minimal right could only be to force indigency upon the defendant by freeze orders. Since this creates a right to appointed counsel, a right not affected in any way by the Act, the Act does not on its face violate the minimal right, nor could it by any application other than one that included a follow-up refusal to appoint any counsel. No such application is involved in any of the cases before us.

This leaves only the possibility that the Act, either facially or by specific applications, might violate a defendant's sixth amendment right to counsel of choice. This, say the defendants, will necessarily occur whenever freeze orders actually force indigency upon a defendant, or, short of that, whenever the threat of freeze orders or ultimate forfeiture makes retention of private counsel a practical impossibility. Defendants further contend that such a violation would occur and could be determined immediately

upon the effective deprivation of counsel of choice rather than only upon a defendant's subsequent conviction. The government on the other hand contends that the indirect deprivation of private counsel of choice by governmental freeze orders or the mere threat of forfeiture under the Act would not, under any circumstances, violate this particular narrowly qualified sixth amendment right. Furthermore, says the government, just as in the case of a claim of ineffective assistance of counsel, such a claim could only be determined after a defendant's conviction.

It is this specific right to counsel of choice that the defendants and associated *amici* fix upon most strongly in claiming constitutional violation by applications of the Act's forfeiture provisions. It is also this right that courts seeking to avoid constitutional questions by statutory interpretation have thought most obviously threatened by the Act. *See, e.g., Bassett*, 632 F.Supp. at 1316; *Reckmeyer*, 631 F.Supp. at 1196; *Rogers*, 602 F.Supp. at 1348-50; *cf. Badalamenti*, 614 F.Supp. 197 (problem is not counsel of choice, but absolute denial of counsel to non-indigent by chilling effect). And it seems fair to say that the government on these appeals has recognized this as the right most seriously drawn in issue by the forfeiture of attorney fees.

We agree with defendants that certain applications of the Act, properly challenged on these appeals, violate the sixth amendment right to counsel of choice and that the Act is to that extent unconstitutional. To show why requires an analysis of the nature of this particular right that examination in other contexts may not have forced.

There is, beyond the minimal or basic sixth amendment right to *some* counsel, a component right—concededly qualified—to counsel of one's choice. *See Powell*, 287 U.S. at 53, 53 S.Ct. at 58. This means, in general, a right to retain private counsel of choice out of one's private resources, and up to the limit of those resources, free of

government interference. *See United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir.1973); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C.Cir.1978) ("accused who is financially able to retain counsel must not be deprived of the opportunity to do so"). Thus, while it has presumably never been attempted, it seems clear that any legislative attempt by general rule directly to put a cap on what persons accused of crimes could pay privately retained defense counsel, or to dictate the choice of private counsel by special qualification, or however, would be unconstitutional.

Indeed it is plain upon consideration of the way in which the contours of the sixth amendment's total guarantee have evolved that the right to be represented by privately retained counsel is the primary, preferred component of the basic right to *some* counsel. *See Linton v. Perini*, 656 F.2d 207, 209 (6th Cir.1981) ("essential component"). The companion right to appointed counsel has only emerged, rather late in the interpretive process, as an enforceable back-up right when available private resources do not permit exercise of the primary right. *See Powell*, 287 U.S. at 60-71, 53 S.Ct. at 60-65. It seems plain that the sixth amendment guarantee of counsel was written on the assumption that the primary right being secured against government encroachment was the right to be represented by counsel freely chosen and paid under private contract.

In view of some of the government's arguments in these appeals, it is well to recognize at the outset that this primary right to privately retained counsel contains anomalies that may appear singularly unfair and indeed positively undemocratic. For the primary, privately exercisable right is plainly an unequally distributed one. Some defendants, frequently the most unworthy as events demonstrate in the end, are able to hire the "Rolls-Royce of attorneys," *cf. In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Payden)*, 605 F.Supp. 839, 850 n. 14 (S.D.N.Y.1985) (no right to hire "Rolls-Royce of

attorneys"), while others have to settle for considerably less in quality. But recognizing the anomaly ends the matter for purposes of this analysis. It is an irrelevancy once recognized, except as it necessarily defines technical indigency as the point at which the inability privately to exercise the primary right gives rise to the legally enforceable back-up right.

As indicated, this primary right is, however, a qualified one, and the nature of the right has indeed been worked out essentially in terms of the qualification. This has occurred primarily in cases where trial continuances were being sought to secure or preserve the services of privately retained counsel. In that context, *see, e.g., Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *Sampley v. Attorney General*, 786 F.2d 610 (4th Cir.1986), the right has been held qualified by the government's countervailing interest in the orderly administration of justice, *see Ungar*, 376 U.S. at 589, 84 S.Ct. at 849-50; *Sampley*, 786 F.2d at 613; *see also United States v. Cunningham*, 672 F.2d 1064, 1074-75 (2d Cir.1982) (right protects against arbitrary disqualification of counsel). Further specific qualifications have been recognized. Perhaps the principal one is that the right is only the right to a "fair opportunity" to choose one's counsel; it is not determined by the mere whim of an accused. *See Powell*, 287 U.S. at 53, 53 S.Ct. at 58; *Sampley*, 786 F.2d at 613. Also, the right does not embrace any guarantee of a "meaningful attorney-client relationship," *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983). In sum, it may be expressed as the right to be free of arbitrary governmental interference in choosing, paying, and retaining the services of privately retained counsel. *See Ungar*, 376 U.S. at 589, 84 S.Ct. at 849-50.

Though the essential nature of the qualified right has been worked out primarily in the context of motions for continuance of trial and for disqualification of counsel, the attributes of the right summarized above are applicable as

well in the attorney fee forfeiture context. In this context, the issue is the extent to which legitimate governmental interests justify—make not arbitrary—governmental deprivation of the right of accused persons to choose and pay privately retained counsel by the indirect means of freeze orders and the Act's *in terrorem* effect upon the availability of private counsel. We accept the fact, as does the government (both in its litigation position and in the Justice Department guidelines) that the Act necessarily has that effect upon the practical ability to retain private counsel of choice.

The governmental interests asserted on these appeals are those identified in the Act's relatively sparse legislative history. Those interests are: "to preserve [by pre-conviction restraining orders] the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure [by the relation-back forfeiture provision] that he cannot as a result avoid the economic impact of forfeiture," Senate Report at 195-96, 1984 U.S.Code Cong. & Ad.News at 3378-79, and, more specifically, to strip racketeers and drug dealers of their "economic power bases" upon conviction, *id.* at 191, 1984 U.S.Code Cong. & Ad.News at 3374. To these specific legislative purposes, the government adds by way of argument on these appeals the manifest purpose of deterrence.

No one disputes that these governmental interests outweigh any "right" by an accused to transfer tainted property to his defense counsel, ostensibly as attorney fees but in reality as a sham to prevent forfeiture. The courts in *Bassett* and *Reckmeyer*, for example, following other district courts, saw no constitutional question respecting freeze orders and forfeiture orders directed at sham or fraudulent transfers. They found the limit of the Act's intended reach precisely on this basis.

We believe instead that though Congress intended the Act to reach further, sham or fraudulent transfers define the permissible constitutional reach of the Act in permitting the forfeiture of attorney fees. We think, that is, that these governmental interests cannot override an accused's right legitimately (i.e., without sham or fraud) to use his property, even that ultimately proven to be tainted by criminal conduct, to employ private counsel to defend him against criminal charges.

The primary right to counsel of choice must certainly, in this context, encompass that much. If it does not, it is hard to see why government might not do directly what unlimited freeze orders and the threat of forfeiture may obviously do indirectly: simply deny persons accused of certain crimes (or all crimes?) the right to employ private counsel to assist them so long as the back-up right to appointed counsel remains. This would effectively cut off the primary component of the basic sixth amendment right to counsel as we have defined it, and would obviously be unconstitutional if we have correctly analyzed the primary right. If the constitution forbids such a direct denial, it equally forbids an indirect one.

We come to the same conclusion by a process of balancing the individual interests here at stake against these asserted governmental interests. *See Sampley*, 786 F.2d at 613 (limit of the right to counsel of choice is "found in the countervailing [government] interest"). The right to counsel—whether privately retained or publicly appointed—was obviously created for protection of the guilty as well as the innocent. It must certainly have been created, therefore, on the assumption—indeed with the sure knowledge—that in exercising the primary right to privately retained counsel, ill-gotten gains might be used by defendants who would ultimately be found guilty. Certainly this is a traditional working assumption within the legal profession and one so firmly grounded that it may well explain the incredulity of some district judges and the

organized bar that Congress could possibly have intended effectively to undercut it.

Another individual interest at stake is the interest in having effectively armed private counsel, which means at the very minimum counsel sufficiently informed to mount an effective defense or otherwise provide effective assistance. This necessary assumption of the adversarial system—hence, we must believe, of the authors of the sixth amendment—is also effectively undercut—practically emasculated—by provisions of the Act which make counsel's very ability to retain legitimately contracted fees dependent upon his not being fully informed. This, it must be emphasized, goes not to the right to effective assistance of counsel, but to the primary right to representation by privately retained counsel of choice.

We do not believe that these powerful, constitutionally secured individual interests—grounded in root assumptions of our adversarial system—are outweighed in the constitutional balance by the asserted governmental interests in deterrence, in preserving property for forfeiture, and in depriving convicted persons of their economic bases for further criminal activity. We are therefore satisfied that applications of the Act which effectively deprive of the ability to retain private counsel on any basis other than sham and fraud participated in by counsel involves arbitrary action by government against which the sixth amendment provides protection. Put another way, within established doctrine, we think such applications necessarily deprive accused persons of the fair opportunity guaranteed by the sixth amendment to retain private counsel of choice.

The government's attempts to avoid this constitutional challenge do not persuade us, but their implications are instructive, for they tend to confirm our analysis. The primary governmental contention, rather uncertainly advanced, seems to be that the only constitutional protection against governmental action that effectively cuts off the

ability of an accused to retain private counsel is that provided by the basic sixth amendment right to some counsel, and the further right to the effective assistance of that counsel.

According to this view, there is in this context no primary right to counsel of choice, but only a right to private counsel of choice or appointed counsel at the government's election. Beyond this, there is only a right to the effective assistance of whatever counsel is permitted by government, a right that can only be asserted after conviction and then only by testing that counsel's efforts against the minimal standards of competence and demonstrable prejudice described, e.g., in *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 2064-67, 80 L.Ed.2d 674 (1984).

In this way, the entire question of prejudice resulting from cutting off access to private counsel is mooted by the appointment of public counsel, and the sole question remaining is whether that counsel performed up to minimal standards, rather than the more appropriate but now unanswerable question of whether he performed as competently as would have private counsel of choice. We cannot believe that such a result is contemplated by the sixth amendment's guarantee of the right to counsel.

Attempting to denigrate the essential nature of the primary right to counsel of choice, the government points to various ways in which, without any possible constitutional violation, an accused may find himself unable to exercise that right: unwillingness of counsel to accept representation; disqualification or voluntary withdrawal of counsel; justified refusals to continue cases scheduled for trial; in rem forfeitures and jeopardy tax assessments. These examples certainly illustrate that the right is not absolute, but none has all the distinctive aspects of the in personam forfeitures and associated freeze orders here in issue.

Refusal of particular counsel to accept representation or the withdrawal of retained counsel do not involve governmental action and, along with disqualification, leave open the possibility of further choice; freeze orders or the threat of forfeiture may cut off all ability to choose. Refusals to continue scheduled cases are only justified where the defendant is effectively to blame for failing to exercise the right of choice; forfeiture is authorized under the Act notwithstanding diligent efforts by an accused to retain counsel.

In rem forfeitures and jeopardy tax assessments, which the government contends have never been thought to violate sixth amendment rights though they too might force indigency, concededly provide close parallels. But we think that the parallels are not perfect, and in any event, we are not prepared to say and need not say here, that under no circumstances might these too violate this constitutional right. The government cites the most common example of sequestrations of contraband (the bank robber's loot) as a parallel; but of course it is not. In such cases, the government seizes property manifestly that of someone other than the accused and for preservative purposes. Forfeiture under the Act may obviously reach property of the accused to which no third party has a superior claim. The financial plight that may result to an accused from sequestration of contraband is simply of a piece with that resulting from other vagaries of life that may make it impossible to hire private counsel.

Jeopardy tax assessments, arguably upheld by at least one court against a comparable sixth amendment challenge, *see United States v. Brodson*, 241 F.2d 107 (7th Cir.1957) (en banc), provide the closest parallel. We think that these too are distinguishable from forfeitures and freeze orders under the Act. But to the extent they may not be, we need not decide here whether they too might under some circumstances implicate the right to counsel of choice. The critical distinction, if one be needed, is that

the jeopardy assessment has as its purpose the preservation of property already owed and wrongfully withheld from the government. In that situation, it might well be that the governmental interest in preservation of the property is more powerful than those asserted in justification of "relation-back" forfeitures of property to which the government had no claim that pre-existed the criminal conduct charged.

Finally, the government suggests that any indigency caused by freeze orders or the threat of forfeiture under the Act is not attributable to government action, but to conduct of the accused sufficiently questionable to produce grand jury or judicial determinations of probable cause. This borders on sophistry, given the obvious point that the sixth amendment guarantee applies equally to the guilty and the innocent. *See Badalamenti*, 614 F.Supp. at 198.

In sum, we hold that to the extent the Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice. *Cf. United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir.1986) (Rubin, J., concurring specially) (Act violates substantive due process where all assets frozen). Because prejudice is presumed from the denial of counsel of choice, *see United States v. Rankin*, 779 F.2d 956, 960 (3d Cir.1986); *Wilson v. Mintzes*, 761 F.2d 275, 285 (6th Cir.1985); *United States v. Burton*, 584 F.2d 485, 491 n. 19 (D.C. Cir.1978),[10] a

[10] *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984), is not, as the government suggests, to the contrary. In holding that a criminal defendant cannot take an interlocutory appeal from an order disqualifying his counsel, the *Flanagan* Court simply applied the strong policy against allowing piecemeal review in criminal cases. It did not hold that this was because denial of the right to counsel of choice was not presumptively prejudicial, and indeed held that immediate appeal would not lie whether or not prejudice was presumed. 465 U.S. at 269, 104 S.Ct. at 1057. While direct decision on this question was avoided by the Court, the stronger implication from its discussion of the alternative possibilities is that prejudice is presumed where counsel of choice is denied. *See Rankin*, 779 F.2d at 960 (so reading *Flanagan*).

There is, of course, no corresponding question of the appealability of the orders in *Bassett* and *Reckmeyer*. Both are government appeals from adverse injunctive orders entered in connection with the ancillary forfeiture provisions in the RICO and CCE statutes. Different rules of appealability apply to these as a matter of congressional policy, notwithstanding they may have some of the same untoward consequences as would interlocutory appeals by defendants.

violation of this right occurs and is remediable as soon as governmental action either directly effects or immediately threatens the unconstitutional result. *Cf. Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir.1982) (threat of enforcement of ordinance creates justiciable constitutional case).

There remains the issue of how, within the Act's otherwise constitutional application, this sixth amendment right to retain private counsel of choice may be asserted and enforced. This requires some further analysis of the limits of the right and the practical protection due and available to protect it.

Viewed practically, the right as asserted in the context of these cases is only to retain sufficient property, free from government interference, with which to be able to pay legitimate, i.e. reasonable, attorney fees for assisting in a defense to the underlying charges. This means that to the extent an accused has sufficient property not subject to the forfeiture ultimately sought (as that will necessarily be identified by an indictment or a pre-indictment freeze order motion under § 853(e)(1)) his right to counsel of choice is not implicated by any governmental action authorized by or potentially available under the Act. On the other hand, to the extent there is not sufficient untainted property available for that purpose, protection of the use

of "tainted" resources cannot be limited constitutionally by the requirement that the attorney be a "bona fide purchaser" within contemplation of § 1963(m)(6)(B); but only by the requirement that the contracted or completed transfer of property as attorney fees shall have been legitimate, i.e., not based upon a sham or fraudulent transaction.

In terms of practical enforcement of the right within the Act's framework, this leads to the following. Adequate protection of the right to retain private counsel against the mere threat of forfeiture now exists by virtue of our holding that legitimate attorney fees are constitutionally protected from forfeiture. Since the "bona fide purchaser" requirement may not be applied to defense counsel seeking to protect legitimately paid attorney fees, private attorneys may undertake representation, accepting legitimate fees, without fear of suffering relation-back forfeiture of those fees. With this decision, there is thus no longer any practical necessity for anticipatory pre-conviction motions by either counsel or defendants seeking exemption of particular property from potential freeze orders or forfeiture. They need only contract for and accept legitimate fees.

Where freeze orders are sought by the government, either before or after indictment, enforcement of the right may require judicial determination of two disputable factual issues. The first is whether the defendant has sufficient resources not sought to be frozen with which to employ private counsel. If she does, there is no constitutional impediment to issuing the freeze order as requested. If the defendant does not have sufficient untainted resources, there is only the question whether "tainted" property proposed to be transferred as attorney fees is to any extent based upon a sham or fraudulent transaction as opposed to being within the range of reasonable, hence legitimate, attorney fees. Only to the extent the proposed transfer is found fraudulent—not legitimate—is any freeze order affecting such property constitutionally permissible.

See Thier, 801 F.2d at 1475-77 (Rubin, J., concurring specially).

As to these potential factual issues, we believe that both the burden to show the availability of adequate untainted resources and the burden alternatively to show that a proposed transfer of tainted property is to any extent based upon sham or fraud should be upon the government. *See id.* at 1476-77 (burden to show availability of sufficient untainted resources should be upon government). It is the government which seeks this extraordinary remedy and which has identified the property it considers forfeitable. It should therefore bear the burden of proof on the dispositive issues. The order of proof as well as the means of proving sham or fraud and the reasonableness of attorney fees under the circumstances of particular cases must of course be left to the district courts.

B.

The defendant in *Harvey*, as indicated, has raised a separate constitutional challenge to the Act's authorization in § 853(e)(1)(A) of *ex parte* post-indictment restraining orders without any requirement of a post-restraint hearing. Such a restraining order was issued in his case and he contends that this deprivation of his property without such a hearing violated his fifth amendment right to procedural due process.

The government contends that the indictment, based upon a finding of probable cause to believe that the property was forfeitable, supplied all the process due, or that, alternatively, the criminal trial itself, though it did not follow immediately upon the restraining order, supplied adequate post-deprivation process.

We agree with the defendant and with those other courts that have held that neither the indictment itself nor a criminal trial held, as here, three months after issuance of an *ex parte* restraining order affords the procedural due

process guaranteed by the fifth amendment. *See United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir.1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.1985); *see also United States v. Long*, 654 F.2d 911, 915 (3d Cir.1981) (government cannot rely on indictment alone to show entitlement to a pre-conviction restraining order).

Due process requires that a person not be deprived of his property without notice and opportunity for a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Where governmental interests permit seizure before notice and hearing, they must be provided within a meaningful time thereafter. *Crozier*, 777 F.2d at 1383-84. The exact process due is determined by balancing "the risk of an erroneous deprivation, the state's interest in providing specific procedures and the strength of the individual's interest." *Crozier*, 777 F.2d at 1383; *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43, 105 S.Ct. 1487, 1493-94, 84 L.Ed.2d 494 (1985).

Post-indictment restraining orders of the kind authorized by the Act and as actually entered in Harvey's case obviously may work a tremendous hardship on accused persons. Stripped of all or major portions of his financial resources, an accused (unless in detention) may be unable pending and throughout trial to provide for the basic necessities of life and whether or not in detention, to provide for the preparation of his legal defense. The defendant's interest is obviously a powerful one, and the risk of an erroneous deprivation substantial. On the other hand the government's interest in providing a particular form of procedure is certainly no different after indictment than in the pre-indictment setting. No reason appears why the government would be unduly burdened or any public interest disserved by providing the same sort of immediate post-deprivation hearing in the post-indictment setting as is required in the pre-indictment setting by § 853 or as is contemplated by Fed.R.Civ.P. 65.

The indictment itself obviously does not afford the type adversary hearing required by due process, though it may suffice as adequate notice and as a sufficient justification for entering the restraining order *ex parte*. *See Thier*, 801 F.2d at 1469. Neither does a criminal trial held, as here, as much as three months after the *ex parte* order, provide a hearing within a meaningful time.

We therefore hold that to the extent the Act authorizes the issuance of *ex parte* restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees, and that as applied specially in Harvey's case, it violated his fifth amendment rights to procedural due process.

V

It remains to apply the above conclusions, including those of constitutional violation, to dispose of the three cases before us.

A.

Bassett, No. 86-5069.

The order from which the government appeals in this case is one entered upon the pre-trial motion of defendants to exempt property sufficient to pay their legal fees from forfeiture, made in response to the Government's notification that it would seek forfeiture of those fees upon defendants' convictions. As noted above, the district court granted the motion on the basis that forfeiture of attorney fees was not intended under the Act in the absence of sham or fraud; and on a finding that there was no sham or fraud associated with the payment of the fees in question.

We have held that property forfeitable under the Act's provisions which has been contracted for or paid as attorney fees may constitutionally be forfeited or re-

strained from transfer only when and to the extent the fee transaction was a sham or fraudulent one. Here, though on a different basis, the district court has made findings, not challenged, that the fee transaction with appellees' counsel was not infected by sham or fraud.

Accordingly, though on the constitutional ground adopted in this opinion, rather than the district court's statutory interpretation ground, we affirm the district court's order exempting legitimate counsel fees from restraining orders and forfeiture. This must, however, be without prejudice to the Government's right to seek forfeiture, following conviction, of any portion of the aggregate of fees paid which are not legitimate in the sense here discussed.

B.

U.S. v. Caplin & Drysdale (Reckmeyer), No. 86-5050.

The order from which the government appeals in this case is one entered upon the third-party claim of defendant Reckmeyer's counsel,[11] following Reckmeyer's conviction

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[11] Counsel's standing to raise the constitutional issues by this m/eans [sic] has been obliquely questioned by the government, both in the district court and on these appeals. We have considered the matter and conclude that standing clearly exists in counsel to raise the counsel of choice issue derivatively. There are of course prudential concerns about standing to assert constitutional rights derivatively, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 2971, 86 L.Ed.2d 628 (1985), but they are not present here. There has been a preexisting relationship between counsel as litigant and their client as possessor of the right that insures effective derivative presentation of the constitutional claim, *see Singleton v. Wulff*, 428 U.S. 106, 114-15, 96 S.Ct. 2868, 2874-75, 49 L.Ed.2d 826 (1976); failure to adjudicate the constitutional rights derivatively asserted would dilute or adversely affect those rights, *see Craig v. Boren*, 429 U.S. 190, 196, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976); and the rights of the litigant and the possessor of the right are obviously intimately connected and bound together, *see id.*

Furthermore, we reject any suggestion that by continuing their representation, counsel effectively mooted or waived derivatively any claim of denial of counsel of choice. Under the circumstances, counsel resolved an ethical dilemma by remaining in the case at considerable financial risk, in order, among other things, to challenge the forfeiture provisions. We will not hold that this resolution made the constitutional claim, timely raised, no longer justiciable.

by guilty plea, seeking exemption under § 413(n) of the CCE Act, of legal fees paid to counsel and, in part, held in escrow pending the conviction. As indicated above, the district court granted exemption on the basis, as in *Bassett*, that the Act did not contemplate forfeiture of legitimate attorney fees, the legitimacy of those in issue not having been questioned.

Here, as in *Bassett*, we affirm, though on constitutional rather than statutory grounds.[12]

C.

Harvey, No. 86-5025.

In this appeal, Harvey seeks to challenge his conviction on the grounds that the *ex parte* post-indictment restraining order both violated his sixth amendment right to counsel of choice and to the effective assistance of counsel, and his fifth amendment right to procedural due process.

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[12] Theoretically, under our constitutional holding, the government might have avoided exemption by proving, as an alternative to sham or fraud in the fee transaction, that *Reckmeyer* had available sufficient untainted resources so that the forfeiture of those resources identified in the restraining order and indictment could not have violated his right to counsel of choice (laying aside the separate point that here his counsel of choice remained in the case). That being so, it might be thought that the government should yet have the right, in view of this decision's later advent, to make such a showing if it can. This would of course require a remand opening the district court's order, rather than an outright affirmance. In view of the breadth of the forfeiture, however, we believe that this would be an empty formality, and decline, in the interests of finality, to remand for such a purpose.

(1)

As to the sixth amendment challenge on ineffective assistance grounds, we hold, in line with our traditional approach, that it is not properly made on this direct appeal, but may properly be made only in a collateral proceeding under 28 U.S.C. § 2255. *United States v. Fisher*, 477 F.2d 300, 302 (4th Cir.1973). This case is quintessentially one in which the record of trial court proceedings does not adequately develop the facts necessary to consider whether the restraining order here challenged actually resulted in ineffective assistance of counsel and, if so, whether actual prejudice occurred under the test of *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

The attempted challenge on denial of counsel of choice grounds presents a more difficult problem. Under our decision today, the restraining order entered here, being based on no finding of sham or fraud in respect of the attorney fees it affected, may technically have violated Harvey's sixth amendment right to counsel of choice. But there is the great complexity here that his counsel of choice was kept in the case—though in somewhat altered identity and reduced numbers—by the device of appointment. From this, the government argues that any technical violation of the right to unfettered choice of particular counsel in particular numbers is demonstrably harmless beyond a reasonable doubt where as here, substantial identity and numbers are preserved by the appointment device. To this, Harvey responds, that, as we have now held, denial of counsel of choice is one of those constitutional errors that is *per se* prejudicial, i.e., not subject to harmless error excuse. On this basis, he says, he is entitled to immediate reversal of his conviction for the constitutional violation that manifestly occurred.

Without doing violence to the constitutional principle on which our decision is based, we need nevertheless to deal

realistically and practically with the narrowly specific problem that was raised in this case but will not recur in light of our decision today. It will not recur because indigency requiring appointment of counsel can no longer be forced by restraining orders or the threat of forfeiture of legitimate attorney fees. While it did occur here, the appointment of substantially the same counsel that had been privately retained makes any constitutional violation of this particular right in this case at least arguable. Where substantially the same counsel has been substituted, the more serious question is whether the reduced fees and support resources that resulted may have resulted in significantly reduced effectiveness of counsel. This, we conclude, can fully and properly be considered only in connection with any collateral claim of ineffective assistance of counsel that may be made under 28 U.S.C. § 2255, and to that we relegate the question.

(2)

We have held that the post-indictment *ex parte* restraining order violated Harvey's procedural due process rights for want of an adequate post-deprivation hearing within a meaningful time.

This, of course, is error that does not go to his conviction, but only to the deprivation of his property without procedural due process. Consequently, reversal of Harvey's conviction is not an appropriate remedy for this error. *See United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir.1984). Nor, so long as his conviction and the accompanying order of forfeiture stand, would Harvey be entitled to vacation of the restraining order, the error in its entry having been rendered harmless by the later jury determination of forfeitability. *See id.; cf. United States v. Crozier*, 674 F.2d 1293, 1298 (9th Cir.1982) (comparable error remediable before trial by vacation of restraining order). Whether Harvey might under any present or future circumstances

have a civil remedy for the temporary violation of his procedural due process rights is of course not before us.

VI

For the above reasons, we affirm the order exempting attorney fees from forfeiture in No. 86-5069, *United States v. Bassett & Meredith*, without prejudice to the government's right in further proceedings to seek forfeiture of any other property or funds transferred as attorney fees in sham or fraudulent transactions; we affirm the order exempting attorney fees from forfeiture in No. 86-5050, *United States v. Caplin & Drysdale (Reckmeyer)*; and we affirm the conviction in No. 86-5025, *United States v. Harvey*, without prejudice to the right of the defendant to challenge the conviction in collateral proceedings under 28 U.S.C. § 2255 on the constitutional grounds sought to be asserted on this direct appeal.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Crim. No. 85-00010-A

UNITED STATES OF AMERICA
v.
CHRISTOPHER F. RECKMEYER, II, et al.

March 27, 1986.

MEMORANDUM OPINION

CACHERIS, District Judge.

This matter is before the court on the Petition of the law firm of Caplin & Drysdale Chartered ("Caplin & Drysdale") who seek a modification of the forfeiture order entered by the court on May 17, 1985, to permit payment of defendant Christopher Reckmeyer's attorneys' fees. This case presents a conflict between the forfeiture of drug related assets under the Comprehensive Forfeiture Act of 1984 and a defendant's right to counsel under the Sixth Amendment to the Constitution. For the reasons set forth below, the Petition is granted.

I

The basic facts are not in dispute.

The law firm of Caplin & Drysdale began representing Christopher Reckmeyer in the summer of 1983, in con-

nection with a grand jury investigation of drug trafficking activities in the Eastern District of Virginia which culminated in an indictment issued against Reckmeyer and twenty-five other individuals on January 15, 1985. As of December 31, 1984, Reckmeyer owed Caplin & Drysdale $26,444.97 for services rendered and costs incurred through that date.

On January 14, 1985, this court issued an Order pursuant to an *ex parte* application by the government which restrained the transfer of assets by Reckmeyer and others. On January 25, 1985, Christopher Reckmeyer surrendered. At his request, Caplin & Drysdale continued to represent him in his defense of the indictment. On March 14, 1985, Christopher Reckmeyer plead guilty to Count 2—engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. He also plead guilty to Counts 26 and 31, which charged violations of Federal tax laws.

On March 15, 1985, oral argument was held before Judge Bryan of this court on Reckmeyer's motion filed on March 7, 1985, for an order modifiying the restraining order of January 14, 1985, to exclude attorneys' fees from forfeiture. Judge Bryan denied this motion on March 15, 1985, on the ground that Reckmeyer had plead guilty to Count 2 on the previous day. Judge Bryan stated, however, that Caplin & Drysdale could, on its own behalf, raise the issue of forfeitability of attorneys' fees in the context of a third-party petition.

On May 17, 1985, Reckmeyer was sentenced to a period of incarceration, and a Forfeiture Order was entered listing virtually all assets possessed by Reckmeyer, including real estate, gems and $200,000 in United States currency. The Forfeiture Order specifically included:

> 29. All monies and funds restrained by January 14, 1985, restraining order entered in the above styled case, including but not limited to the approximately $25,000 held in escrow by Bernard S. Bailor [a member of the law firm of Caplin & Drysdale] and/or his agents.

Forfeiture Order dated 5/17/85.

In defending the charges against Reckmeyer, Caplin & Drysdale incurred the following expenses and time charges:

a. Disbursement for the retention of Stanley J. Reed of Lerch, Early, Roseman & Frankel to assist in Reckmeyer's defense. Mr. Reed was retained in order to comply with the requirements of Canon 6, ABA Code of Professional Responsibility because Caplin & Drysdale was not experienced in defense of drug cases. (Exhibit G.)	$ 46,975.54
b. Other disbursement in connection with the defense (duplicating, telephone, investigators, etc.) (Exhibit H).	$ 14,313.95
c. Caplin & Drysdale attorney time charges. (Exhibit H).	$109,223.50
Total Expenses	$170,512.99

In rendering these services to Reckmeyer, Caplin & Drysdale was a good faith provider of services for value. Caplin & Drysdale has not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets. Pursuant to 21 U.S.C. § 853(n)(2), Caplin & Drysdale filed its Petition to the court for a hearing to adjudicate the validity of their interest in the forfeited assets.

II

Caplin & Drysdale argues that the forfeiture statute was not intended to reach legitimate attorney's fees, and there-

fore they are entitled to be paid the fees and costs incurred in representing Christopher Reckmeyer. They further argue that any construction of the forfeiture statute which reaches legitimate attorney's fees would violate a criminal defendant's Sixth Amendment Right to Counsel. The government argues that the attorneys only have standing to contest the forfeiture of $25,444.97 actually delivered to them by Reckmeyer but do not have standing to contest the balance owed by Reckmeyer. They further argue that the forfeiture statute can be plainly read to encompass attorney's fees and that the court should not order the government to pay the defendant's attorney of choice out of funds which rightly belong to the government under the relation-back principle of Section 853(c).

a. *Standing*

Under the Forfeiture Act, the disposition of third-party claims is governed by 21 U.S.C. § 853(n)(6). This section provides:

> (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

> the court shall amend the order of forfeiture in accordance with its determination.

The government argues that petitioners do not have standing to contest the Order of Forfeiture under Section 853(n)(6). The government position is that petitioners cannot claim either a superior right, title or interest "at the time of the commission of the acts which gave rise to the forfeiture," 21 U.S.C. § 853(n)(6)(A), or that they are "bona fide purchaser[s] for value" who were "reasonably without cause to believe that the property was subject to forfeiture," 21 U.S.C. § 853(n)(6)(B).

The legislative history of the criminal forfeiture statute provides: "Third parties who assert claims to criminally forfeited property, which in essence are challenges to the validity of the order of forfeiture, are entitled to a judicial determination of their claim." S.Rep. No. 225, 98th Cong., 1st Sess. 208 (1983), U.S.Code Cong. & Admin.News 1984, pp. 3182, 3391. It is clear from the Senate Report that petitioners' claims fall within the scope of persons which Congress recognized as being "entitled to a judicial determination of their claim," even though they cannot specifically make a claim for relief under Section 853(n)(6). The court having found petitioners to be a good faith provider of services, it follows that they have a legal interest in the property forfeited. Their status is, at least, equal to that of a general creditor, and therefore the court finds that they do have standing to present their claims.[1]

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[1] This ruling is consistent with the court's ruling on the Petition of William Reckmeyer in which it held that Section 853(n)(6)(A) provided standing for all general creditors to make claims which may rebut the government's presumption of forfeitability under Section 853(d). See Memorandum Opinion dated February 5, 1986, at 13. The only difference here, is that the petitioners are challenging the reach of the entire forfeiture statute as it applies to attorney's fees and not the forfeitability of property under a particular section of the statute. The court would also further note that counsel in its representation of William Reckmeyer did raise this issue before Judge Bryan of this court in the

b. *Sixth Amendment*

The court having found that the petitioners have standing, the question before the court is whether counsel fees and costs are exempt from forfeiture under the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853.

Four other district courts have addressed this issue, albeit in a pretrial context. In *United States v. Rogers*, 602 F.Supp. 1332 (D.Col.1985), the government filed a petition for an order restraining transfer of property by defendants under an indictment alleging forfeiture under the Comprehensive Forfeiture Act of 1984. The court held that attorney's fees received in return for services legitimately rendered and not as part of an artifice or sham to avoid forfeiture were not subject to the forfeiture provisions. In *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 605 F.Supp. 839 (S.D.N.Y.1985), the court refused to quash a government subpoena seeking information regarding defense counsel's fee arrangement with defendant in order to obtain information regarding potentially forfeitable assets. In addressing the question of forfeitability, the court, specifically declining to follow *Rogers*, held that the government is entitled to a preliminary order restraining attorney's fees under the Comprehensive Forfeiture Act. In *United States v. Badalamenti*, 614 F.Supp. 194 (S.D.N.Y.1985), the court, in ruling on a defendant's motion to quash a trial subpoena *duces tecum* served upon defense counsel, held that the government may not seek a special verdict as to the forfeiture of attorney's fees under 18 U.S.C. § 1963 or 21 U.S.C. § 853 and may not rely on forfeiture in support of the subpoena at issue.

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form of a motion for modification of the *ex parte* protective order obtained by the government. At that time, Judge Bryan told counsel they could present their claims in the form of a third-party petition under Section 853(n). In light of these facts, the court thinks it would be unfair to not give petitioners standing at this time to hear their claims.

Finally, in *United States v. Ianniello*, 85 Cr. 115 (S.D.N.Y. Sept. 3, 1985) (slip op.) the defendants sought and obtained an order declaring that attorneys' fees are exempt from forfeiture under 18 U.S.C. § 1963.[2]

This court agrees with the reasoning of the *Rogers*, *Badalamenti*, and *Ianniello* courts, and does not believe that Congress intended that the Comprehensive Forfeiture Act of 1984 would encompass bona fide legal fees paid to a criminal defendant's attorney. Such an application of the Act would in all likelihood violate the Sixth Amendment while not furthering any Congressionally desired ends of the statute. Absent some clear indication in the statute or legislative history that Congress did address this issue, it seems inconceivable that they intended the Forfeiture Act to be applied in this manner.

As the court noted in *Badalamenti*, a literal reading of Section 853 would seem to encompass legal fees. Section 853(a) provides that any person convicted of a violation of the federal drug laws shall forfeit "*any* property" which constitutes a proceed or was used to facilitate the criminal activity or, in the case of a person engaging in a continuing criminal enterprise, "*any* of his interest in, claims against, and property or contractual rights affording a source of control over" the enterprise. 21 U.S.C. § 853(a) (emphasis supplied). The statute does not specifically exempt counsel fees. The legislative history of the statute does, however, touch on this issue. The House Judiciary Committee Report states:

> Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel. The Committee, therefore does not resolve the conflict in

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[2] 18 U.S.C. § 1963 is the RICO forfeiture provision which was included in the Comprehensive Forfeiture Act of 1984 and is a mirror of 21 U.S.C. § 853. The cases discussing forfeiture of attorneys' fees under 18 U.S.C. § 1963 are therefore fully applicable to forfeitures under 21 U.S.C. § 853.

> District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case.

H.R.Rep. No. 845, pt. 1 98th Cong., 2nd Sess. 19 n. 1 (1984). This passage, appears to modify the broad language in the statute so that it will not be read as a Congressional affirmation that forfeiture of attorney's fees is constitutionally permissible. It appears that Congress did not intend to take a position regarding the forfeitability of attorney's fees through this legislation, but rather decided to leave the resolution of this issue to the courts. *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 605 F.Supp. at 849-50 n. 14. The broad language of the Section 853(a), which speaks in terms of "any property" of the defendant, should not therefore be read as a Congressional statement that attorney's fees in a criminal case are subject to forfeiture under this Act. This court's finding that the forfeiture of attorney's fees violates the Sixth Amendment is therefore not inconsistent with the Congressional intent behind the Comprehensive Forfeiture Act, it appearing that it was Congress' intent all along that the courts would resolve this question.

The application of Section 853 to encompass bona fide attorney's fees would violate a defendant's Sixth Amendment rights in two ways. First, it would violate the defendant's right to obtain counsel of his choice. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932); *United States v. Inmann*, 483 F.2d 738 (4th Cir.1973) (Sixth Amendment includes right to reasonable opportunity to obtain, and be represented by an attorney of one's choosing where defendant can do so from his own resources). Second, it would create inherent conflicts of interest between the attorney and his client, and would chill the free flow of information between attorney and client, resulting in a deprivation of the defendant's right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Ianniello*, slip op. at 12-13; *United States v. Rogers*, 602 F.Supp. at 1349.

It cannot be disputed that the application of the third-party forfeiture provisions to attorneys' fees will restrict a defendant's ability to obtain counsel of choice. *See* Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim.L.Rep. (BNA) 3001, 3002 (Oct. 2, 1985). Indeed, the notice provisions of Section 853(n)(6)(B) and the "relation-back" doctrine of Section 853(c), as construed and applied by the government, will deprive a defendant of counsel of choice no less effectively than if the government simply prohibited a defendant from hiring a lawyer. Attorneys will not represent a defendant if they know that, upon his conviction, their fees will be subject to forfeiture or that, as in the instant case, due to a restraining order, they cannot be compensated for legal services rendered prior to and including trial, and are later prohibited from asserting an interest in fees which otherwise would have been paid.

The right to obtain counsel of one's choosing is not absolute, but "must be carefully balanced against the public's interest in the orderly administration of justice." *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir.1981). *See also United States v. Burton*, 584 F.2d 485, 488-89 (D.C.Cir.1978) (counsel of choice may only be deprived where compelling need to assure prompt effective and efficient administration of justice); *United States v. Phillips*, 699 F.2d 798, 801-02 (6th Cir.1983) (prosecution must show important interest adversely affected by permitting chosen counsel to proceed).

In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. *See*

S.Rep. 98-225 at 191; *see also Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. *See* S.Rep. 98-225 at 209 n. 47. Exempting legitimate attorney's fees from forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham." *United States v. Rogers*, 602 F.Supp. at 1348, and therefore a defendant who is found guilty will still be separated completely from his economic base.

Subjecting attorney's fees to forfeiture is more likely to impede, rather than advance, the orderly administration of justice. The forfeiture of attorney's fees would likely cause chosen counsel to withdraw, leading to delays, disruption of the criminal proceeding, and further creating serious problems for already overburdened public defenders. It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since that Act places limits on the amount which can be paid as attorney's fees.[3] Finally, subjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO

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[3] The availability of court-appointed counsel under the CJA is also inadequate because, due to threat of forfeiture of attorney's fees, individuals would be deprived of the opportunity to obtain any legal representation before they are officially charged or rendered "financially unable" to hire their own counsel. Thus, during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights.

or drug charge, include a broad list of assets allegedly subject to forfeiture, and inform defense counsel that he is "on notice." Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable. *See United States v. Rogers*, *supra*, 602 F.Supp. at 1350 (application of forfeiture provisions to attorney's fees violates due process because: "The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"). Ultimately, therefore, forfeiture of attorney's fees would undermine the adversary system itself, by producing an imbalance of powers that would violate the due process clause of the Fifth Amendment. *See Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973) (due process requires "balance of forces between the accused and his accuser"); *Gandy v. Alabama*, 569 F.2d 1318, 1321 (5th Cir.1978) (defendant's due process protection includes "fair opportunity to be represented by counsel of his own choice").

As the court stated in *Badalamenti*, the denial of choice of counsel is only the beginning of the problems that the government's position would raise. The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. *See Strickland v. Washington*, 104 S.Ct. 2052 (1984); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.) *cert. denied* 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981).

Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with proceeds of an illegal activity; the attorney's obligation to

negotiate a guilty plea which is in his client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture; the attorney's desire to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture" would conflict with his obligation to maintain his client's confidences. *United States v. Badalamenti*, 614 F.Supp. 194, 196-197 (S.D.N.Y.1985).

The possibility of an attorney appearing as a third-party petitioner in a Section 853(n) hearing also undermines the attorney-client relationship, further impinging on the right to counsel. The threat of an attorney having to disclose information obtained from his client will chill the openness of attorney-client communications. *Rogers*, 602 F.Supp. at 1349. If an attorney advised his client of the possible ramifications of the disclosure of this information to him, the free flow of information would be even further chilled depriving the defendant of effective representation. *Ianniello*, slip op. at 12-13.

In summary, the court finds that the Comprehensive Forfeiture Act does not encompass the forfeiture of bona fide attorney's fees of the defendant. Such a construction of the statute would not violate the Sixth Amendment, and is not contrary to the legislative intent of Congress. Having already found that Caplin & Drysdale was a good faith provider of services for a value of $170,512.99, the court will direct the government to pay Caplin & Drysdale $170,512.99 out of the forfeited assets of Christopher Reckmeyer.

An appropriate Order will issue.

APPENDIX D

Title 21, Chapter 13, Drug Abuse Prevention and Control

§ 853. Criminal Forfeitures

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Third party transfers

(c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Protective orders

(e) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

Warrant of seizure

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Execution

(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

Disposition of property

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

Authority of the Attorney General

(i) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

Applicability of civil forfeiture provisions

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

Bar on intervention

(k) Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Jurisdiction to enter orders

(l) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

Depositions

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

Third party interests

(n) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General

may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interest of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and

evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Construction

(o) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

Forfeiture of substitute property

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which can not be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

APPENDIX E

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, expect in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.